OFFENCES RISING FROM THE RIGHT TO GATHER:

A LEGAL COMPARATIVE STUDY

by

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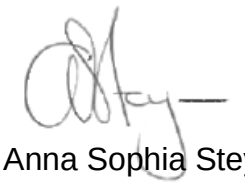
DECLARATION

This research is submitted in accordance with the requirements for the degree of Doctor of Laws (LLD) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **OFFENCES RISING FROM THE RIGHT TO GATHER: A LEGAL COMPARATIVE STUDY** is my own work, and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signature: .  Date: 2 February 2021

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SUMMARY

To gather together is a natural human activity shared by all people. The majority of these activities take place without the involvement of the government, and is of no interest to the law. In South Africa, the right to assemble peacefully, to demonstrate, to picket or to present petitions, is protected in the Constitution of the Republic of South Africa, 1996. When people gather, be it peaceful or violent, participants run the risk of being arrested for committing offences. The way the government of the day reacts to gatherings influence the policing, prosecution and adjudication of offences arising from the right to gather. Current legislation and common-law offences utilised to curb disorder in South Africa are measured against international and regional case law and guidelines. Most of these case law and guidelines linked to international and regional instruments are similar in many respects, and can be deemed as universally acceptable.

It is proposed that the government revisits the mixture of current offences utilised by the prosecution during dissent, public violence or protest action, and that specific public order offences are created, providing for specific unlawful conduct with corroborating sentences. Police powers must furthermore be clearly defined to strengthen the hand of the police to secure law and order, serve as guarantee for the rights and freedoms of everyone, and to create legal certainty. The government must organise applicable public order offences in a single public order act. Legislation applicable to public order must be accessible and easily understandable since protest may be the only avenue for a member of the public to bring his or her plight under the attention of the government. Existing guidelines from applicable international and regional instruments which guide and monitor executive conduct must be included since these guidelines qualify as public order offences.

KEY WORDS: Assembly, Constitution, demonstration, gathering, guidelines, international and regional instruments, incitement, intimidation, limitation, offence, petition, picket, protest, public violence, regulation, sedition, traffic offences, trespassing.

LIST OF ABBREVIATIONS

ACCU	Area Crime Combating Unit
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention of Human Rights
AfCHPR	African Court on Human and Peoples' Rights
African Charter	African (Banjul) Charter on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CCU	Crime Combating Unit
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GG	Government Gazette
GN	Government Notice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IRIS	Incident Reporting Information System
LRA	Labour Relation Act 66 of 1995
NCOP	National Council of Provinces
NDPP	National Director of Public Prosecutions
NPA	National Prosecuting Authority
OAU	Organisation of African Unity
ODIHR	Office for Democratic Institutions and Human Rights

OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organisation for Security and Co-operation in Europe
POP	Public order policing
SAPS	South Africa Police Service
SATAWU	South African Transport and Allied Workers Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations Human Rights Council

CHAPTER ONE

INTRODUCTION

1.1 Background information

To gather together is a natural human activity shared by all people. On a daily basis, activities such as family gatherings, church sermons, festivals, sporting events, school concerts, or students attending classes take place. These acts may be without any financial implications, or involve recompense. Many of these activities take place in online gathering spaces. The majority of these events transpire without the involvement of the government, and is of no interest to the law. There are, however, gatherings that concern the law. The right to assemble peacefully, to demonstrate, to picket, or present petitions are protected by most countries in their constitutions. The right to gather peacefully, together with the rights to freedom of expression and association "constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism".[1] Therefore, it is important that governments take proper care when policing this right.

In South Africa, section 17 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) guarantees the right to assemble, demonstrate, to picket,[2] and to present petitions.[3] This right is utilised by communities, citizens, organisations, or groups, to draw the attention of the media, key role players, or the government to voice their discontent by means of protest action when their rights as guaranteed in the Constitution are infringed, or their demands are not met.[4] When these peaceful gatherings with a common expressive purpose are ignored or not tolerated by governments, participants may resort to violence or crime to further bolster attention to their plight. In this regard, assemblies not only:

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1 ICCPR *General Comment No 37 on the right of peaceful assembly* para [1].

2 Primary and secondary picketing is often used by organised labour to bring management to heel. The Labour Relations Act 66 of 1995 affords trade unions and their members' statutory protection with respect to the right to picket in and about the private property of an employer.

3 For the purpose of this study, this right is referred to as the right to gather. If not otherwise specified, assemblies, demonstrations and pickets are included in the term 'gathering'.

4 Currie and De Waal *The Bill of Rights Handbook* 379.

> …serve as warning to the government of the unpopularity of some of its policies, it also enables the government to identify pressing problems that arise in the time between elections.[5]

On the other hand, this right may also be misused and commercialised – by 'renting' jobless people, in exchange for transport, money or food to protest on request of a beneficiary, or to commit organised crime under the cover of a gathering being protected under the Constitution. The failure to appreciate this right:

> …undermines the ability to achieve the South African constitutional vision of a society based on dignity, equality and freedom, and strikes at the very heart of the ability to make democracy work.[6]

It is consequently of the utmost importance that citizens employ this right responsibly. The government, in particular, has an important role to play in assisting and educating citizens when utilising the right to gather peacefully and unarmed. However, as no one lives in a perfect world, there are various reasons why the government prefers certain gatherings not to proceed, and furthermore also reasons why citizens keep their intention to gather secret. In practice, it seems that many service delivery protests catch the authorities off guard.[7]

When people gather, be it peaceful or violent, participants run the risk of being arrested for committing certain offences. The manner in which the government of the day reacts to gatherings influences the policing, prosecution and adjudicating of offences that stem from the right to gather. This study will first focus on the various offences that stem from the right to gather in South Africa, as well as in selected jurisdictions. As a signatory to several international and regional instruments, South Africa is obliged to follow the obligations as set out in these documents. The research further concerns the question whether the offences rising from the right to gather are adequate to provide for current concerns. These type of offences can be distinguished from other offences since they are qualified by a wealth of guidelines and case law from regional and international instruments.

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5 Currie and De Waal *The Bill of Rights Handbook* 379.

6 Chamberlain 2016 *AHRLJ* 384.

7 See, e.g., the recent attack on Tyefu police officers in the Eastern Cape, where six officers were locked up by the villagers, who were fed up with the high crime rates, and poor and unreliable service from these officers. They were charged with public violence, malicious damage to property, and contravening disaster management regulations governing Level 3 of the Covid-19 lockdown. See Dayimani https://www.news24.com/news24/southafrica/ news/angry-eastern-cape-villagers-attack-police-station-lock-up-useless-unreliable-cops-20210127 (Date of use: 28 January 2021).

1.2 Problem statement

South Africa has been referred to as having one of the highest levels of popular protest and strike action;[8] the country has been described as 'the protest capital of the world".[9] It seems that the right to a public demonstration is the only peaceful means which disenfranchised South Africans possess in order to make a powerful political statement.[10] To demonstrate is a fundamental right of democratic citizenship, similar to the right to take part in political campaigns. This was also the conclusion of the Goldstone Commission,[11] in affirming that public demonstrations of support for or opposition to a policy, organisation, or leader are as essential a part of democratic government as political campaigning and political parties. Where the purpose of the demonstration is protest, the demonstration is at the core of free expression in a democracy. A democratic public can justly insist on demonstrations and protests being carried out peacefully and without violence.[12] Non-violent and non-destructive demonstrations are thus not a form of anarchy, but a method of democratic expression which is an essential right in any egalitarian society. People participating or engaging in protest are troubled people expressing their legitimate concerns on a variety of social or political issues, such as the environment, housing, abortion, ethnic- or racial concerns, and political rights.[13] Even a truly democratic government will have to anticipate that violent organised demonstrations by persons of different persuasions may occur.

8 See Bohler-Muller et al 2017 *SA Crime Quarterly* 81.

9 Roberts *et al* 2017 *SA Crime Quarterly* 63.

10 Heymann *Towards peaceful protest in South Africa* vii.

11 In terms of s 2 of the Prevention of Public Violence and Intimidation Act 139 of 1991, the Goldstone Commission was appointed to inquire into the phenomenon of public violence and intimidation in the Republic, the nature and causes thereof, and what persons are involved therein. The Commission also had to inquire into any steps that should be taken in order to prevent public violence and intimidation, and make recommendations to the State President regarding (i) the general policy which ought to be followed in respect of the prevention of public violence and intimidation; (ii) steps to prevent public violence and intimidation; (iii) any other steps it may deem necessary or expedient, including proposals for the passing of legislation, to prevent a repetition or continuation of any act or omission relating to public violence or intimidation; (iv) the generation of income by the State to prevent public violence and intimidation as well as the compensating of persons who were prejudiced and suffered patrimonial loss thereby; (v) any other matter which may contribute to preventing public violence and intimidation.

12 Heymann *Towards peaceful protest in South Africa* ix.

13 Heymann *Towards peaceful protest in South Africa* 1.

On the Goldstone Commission's recommendation, a statute to regulate public demonstrations was instituted in South Africa. The Regulation of Gatherings Act[14] (hereinafter the Gatherings Act) administers the holding of public gatherings and demonstrations at certain places. The Act also confirms the right to assemble with other persons, and to express views on any matter freely in public. While so doing, the assemblers will enjoy the protection of the state, but the exercise of such right must take place peacefully, and with due regard to the rights of others.[15] With the implementation of these rights, the Gatherings Act have suffered some impediments, especially during the last two decades. One of the biggest challenges is that the Act is mostly ignored by demonstrators.

Section 12 of the Gatherings Act provides for offences and penalties in relation to public gatherings and demonstrations. This section reads as follows:

> (1) Any person who –
>
> *(a)* convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3;[16] or
>
> *(b)* after giving notice in accordance with the provisions of section 3, fails to attend a relevant meeting called in terms of section 4(2)*(b)*; or
>
> *(c)* contravenes or fails to comply with any provision of section 8 in regard to the conduct of a gathering or demonstration; or
>
> *(d)* knowingly contravenes or fails to comply with the contents of a notice or a condition to which the holding of a gathering or demonstration is in terms of this Act subject; or
>
> *(e)* in contravention of the provisions of this Act convenes a gathering, or convenes or attends a gathering or demonstration prohibited in terms of this Act; or
>
> *(f)* knowingly contravenes or fails to comply with a condition imposed in terms of section 4(4)*(b)*, 6(1) or 6(5); or
>
> *(g)* fails to comply with an order issued, or interferes with any steps taken, in terms of section 9(1)*(b)*, *(c)*, *(d)* or *(e)* or (2)*(a)*; or *(h)* contravenes or fails to comply with the provisions of section 4(6); or
>
> *(i)* supplies or furnishes false information for the purposes of this Act; or
>
> *(j)* hinders, interferes with, obstructs or resists a member of the Police, responsible officer, convener, marshal or other person in the exercise of his powers or the performance of his duties under this Act or a

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14 Gatherings Act 205 of 1993 (hereafter the Gatherings Act) commenced on 15 November 1996. It is interesting to note that the Gatherings Act was introduced after the commencement of the transitional Constitution of the Republic of South Africa, 1993 on 27 April 1994. The Constitution of the Republic of South Africa, 1996 was inaugurated on 4 February 1997, three months after the Gatherings Act became operational.

15 Preamble of the Regulation of the Gatherings Act.

16 Section 12(1)*(a)* was declared unconstitutional in *Mlungwana and Others v S and Another* 2019 (1) SACR 429 (CC) (hereinafter *Mlungwana*). For further discussion, see paras 2.3 and 3.4.

regulation made under section 10,

shall be guilty of an offence and on conviction liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(2) It shall be a defence to a charge of convening a gathering in contravention of subsection (1)*(a)* that the gathering concerned took place spontaneously.[17]

Practical problems are experienced with some of the offences listed in this section, and these complications reduce the possibility of a successful prosecution. This study will probe these impairments in order to provide amicable solutions thereof.

In an illegal gatherings case, there is usually a choice to proceed with the offences as listed in section 12 of the Act above, or with the common-law offences regulating some form of gathering, or both; yet it seems that the prosecution frequently proceeds with a charge of public violence.[18] This research will investigate why this is indeed the case. The crime of public violence is categorised by Snyman under the sub-group of "crimes against the state and public order",[19] where the crime is grouped together with two other offences, that of high treason and sedition as crimes against the state.[20] This categorisation of public violence as a crime against the state produces some confusion amongst the general public, and contributes to the perception that this offence is a political crime. Other countries seem to have moved away from common-law offences such as public violence, and enacted specific legislation for particular social problems experience with gatherings. This research will examine and evaluate selected jurisdictions' legislation to ascertain if these laws can be successfully and positively implemented in the South African context. Legislation of other jurisdictions that make specific provision to regulate gatherings will furthermore be compared to the South African Gatherings Act.

This study will also revisit some of the recommendations of the Goldstone Commission in order to ascertain if these proposals are still relevant today. For example, in the Third Interim Report[21] on violence in the Taxi and Minibus Industry, the Commission recommended that the principal of communication should be established between

17 Gatherings Act s 12(1), (2).

18 Public violence is a common-law offence. See Chapter 5, footnote 6 for a definition of public violence.

19 Snyman *Snyman's criminal law* Chapter IX.

20 Snyman *Snyman's criminal law* Chapter IX.

21 Goldstone *Third interim report* 4.

associations (jointly as a committee with community members), and not only between chairpersons.[22] It was advised that members of different associations and taxi operators should practice tolerance and refrain from provocative acts. It was furthermore accentuated that what is needed is more discussion by means of mediation and negotiations[23] to resolve problems, less anger, and greater respect for the rights of others. In short, unless every person wants peace and works toward it, all efforts to combat violence are doomed to failure. The Commission also proposed that municipalities should pay urgent attention to the implementation of the most suitable way to establish an answer to the problem as an important priority, for the benefit of the communities.[24] During gatherings, a suitable procedure to ensure the orderly and efficient passage should be implemented, and marshals should be neutral and not members of the associations.[25] As to the policing of gatherings, the recommendation was that fair, firm and consistent law enforcement is necessary to combat the general lawlessness and lack of discipline that have become rife in South Africa.[26] The possibility to implement these recommendations will be investigated to curb violence during gatherings and to appropriately manage gatherings.

The Goldstone Commission urged that assemblies, if peaceful, must proceed and continue – even if no permission for the gathering was obtained. The Commission was also of opinion that sentences must be as lenient as possible. It is questionable if these considerations are part of the training of presiding officers. Also, the political perception of the presiding officer can cloud sentencing options if a political motive is seen as an aggravating factor in sentencing. The study will compare the factors that must be considered during sentencing procedures, relating to crimes arising from assembly, demonstration, picket and petition in other countries.

One of the central responsibilities of the South African Police Service (SAPS) is to facilitate the right to demonstrate, and to see that demonstrations are nonviolent.[27] In this regard, the South African Police Service Act (SAPS Act)[28] intended to bring about change in the policing approach with the introduction of community-based policing,

22 Goldstone *Third interim report Ibid* 10.
23 Goldstone *Third interim report* 12.
24 Goldstone *Third interim report* 12.
25 Goldstone *Third interim report* 13.
26 Goldstone *Third interim report* 14.
27 Heymann *Towards peaceful protest in South Africa* ix.
28 South African Police Service Act 68 of 1995 (hereafter called the SAPS Act).

and the need to expunge the apartheid-policing style and associated stigmas.[29] The country has experienced a growing number of protest action and unrest which, in some instances, are accompanied by serious provocation, intimidation, public violence and even elements of criminality. In order to curb the unrest, a policy[30] was introduced by the Minister of Police on 29 August 2011. After the implementation of the policy, it seems that no further progress has been made. Technically, the public order policing (POP)[31] unit does not exist anymore as a specialised public order policing function, as envisaged in the SAPS Act.[32] This study will probe the reasons for the inoperativeness of the policy, especially as the main difficulties are still education, training and management.[33]

This research will furthermore investigate the manner in which the legislation regulating gatherings is interpreted and applied by prosecutors. This will be accomplished by evaluating recent court decisions and academic submissions from legal scholars. Recommendations will also be proposed regarding the requirements that courts should consider when adjudicating on all types of gatherings.

The study will lastly consider whether there is a need for further legislative or judicial regulations to ascertain a uniform, accurate approach in determining whether assemblers are guilty in criminal court cases. Since assemblies, demonstrations, picketing and petitions are on the rise in this country, the South African criminal law

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29 Ministry of Police http://www.policesecretariat.gov.za/downloads/policies/policing_public_protests_2013.pdf (Date of use: 29 October 2020).

30 Ministry of Police http://www.policesecretariat.gov.za/downloads/policies/policing_public_protests_2013.pdf (Date of use: 29 October 2020).

31 In terms of the SAPS Act s 17, the National Commissioner is obliged to establish a national public order policing (POP) unit, and maintain the same. Such a unit was established during 1996. Standing Order No 262 on Crowd Management and The National Municipal Policing Standard for Crowd Management are also applicable. Standing Order No 262 states that the use of force must be avoided at all costs, and members deployed for the operation must display the highest degree of tolerance. The use of force and dispersal of crowds must furthermore comply with the requirements of ss 9(1) and (2) of the SAPS Act.

32 During 2002, the POP units were subject to SAPS restructuring and aligned to function at a policing area level as the Area Crime Combating Units (ACCUs). During further restructuring in 2006, the policing areas were disbanded and policing resources 'released' to supplement much needed capacity at station level. The ACCUs were affected, and the name was changed to Crime Combating Units (CCUs). The restructuring also had the effect that the CCUs were incorporated as a section under the division Operational Response Services. The CCUs were drastically rationalised, and more than half of its members were deployed to police station level to strengthen the 'local crime combating' initiatives. The remaining half found themselves in a situation where they had to cover bigger areas with lesser resources. Although the CCUs are still utilised for crowd management, its primary function remains crime combating.

33 Institute of Criminology *Crowd management: Civilian and police conduct* 4.

must be amended to accommodate the various new and complex forms of gatherings that are constantly emerging. It subsequently becomes imperative to research and submit recommendations for legislative reform as to illegal gatherings, and the determination of criminal liability by the courts in such cases. This is because it is conclusive that the requirements advanced by the courts are understated or insufficient to cover a whole range of criminal cases, especially new ones.

1.3 Research questions and hypotheses

The main research question of this study is: Do the current offences arising from the right to gather adequately regulate these types of acts, and how does the legislation impact on the prosecution of such offences? Further questions arising from this research question are:

- What specific conduct constitutes the act of gathering?
- From a structural and practical perspective; what are the challenges with the existing legal framework regulating gatherings?
- How do the courts interpret and apply the requirements of the Gatherings Act in order to hold an accused criminally liable?
- What can South Africa learn from the experience of international law and other jurisdictions' efforts when dealing with illegal gatherings?
- Are law reforms necessary, and if found to be so; which policy and legislative response might regulate gatherings?

The hypotheses essential to the research in this study are the following:

- The regulation of gatherings has never satisfactorily been dealt with by South African legislation and courts.

- The legislative framework that currently regulates gatherings is inadequate or incoherently implemented in South African criminal law as different prosecutors employ different types of offences to charge accused persons.

- The manner in which international law and comparative jurisdictions deal with gatherings may assist South African jurisprudence in providing better guidelines in order to regulate the various offences.

1.4 Research methodology

This research will be qualitative in nature as well as a comparative study. Qualitative research is described as:

> ...an interdisciplinary, transdisciplinary, and sometimes counter-disciplinary field. It crosscuts the humanities and the social and physical sciences. Qualitative research is many things at the same time. It is multi-paradigmatic in focus. Its practitioners are sensitive to the value of the multimethod approach. They are committed to the naturalistic perspective and to the interpretive understanding of human experience. At the same time, the field is inherently political and shaped by multiple ethical and political positions.[34]

By undertaking a qualitative study, it is implied that the qualities of the issues researched are emphasized. This involves a process of interpretive analysis where data (or legal texts as the object of analysis) is studied in order to "secure an in-depth understanding of the phenomenon in question".[35] Although qualitative research "crosscuts disciplines, fields, and subject matters",[36] this thesis will focus on the law, and mainly South African law, as well as all available legal material that will enhance the comprehension of the research. As such, the study is based on a desktop literature review of books, journal articles, legislation, case law, international guidelines, research reports and academic opinions. A critical analysis of the relevant South African legislation and case law will be undertaken, and compared with the relevant law of other countries.

1.5 Literature review

During the past century, there have been countless examples of civil disturbances around the world. The size and scope of these civil disorders vary from small gatherings of people merely protesting verbally, to full-blown riots resulting in property destruction, violence against others, and death.[37] Some of the factors influencing public fracases worldwide are fluctuation of the global economy; competition for natural resources or basic human needs; and differing opinions on religion, politics,

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34 Denzin and Lincoln *The Sage handbook of qualitative research* 10.
35 Denzin and Lincoln *The Sage handbook of qualitative research* 7.
36 Denzin and Lincoln *The Sage handbook of qualitative research* 3.
37 US Department of the Army *Civil disturbances* vi.

and human rights.

History has shown that people everywhere demand to be treated fairly, and want their grievances to be heard.[38] In their efforts to be acknowledged, demonstrations are particularly the primary choice of protest by the numerous and, therefore, the most influential. So, for instance, the poorest, most frustrated and disappointed citizens of a new South Africa may well demonstrate in large, and, perhaps, disorderly numbers in an effort to speed up the pace of change.[39] This was already anticipated by the Goldstone Commission who added that many of the special difficulties of demonstrations in South Africa will remain, although taking new forms.[40]

Despite the prevalence of gatherings in South Africa, not much legal research has been completed on the topic. Only four research studies were located that focused on some element of the Gatherings Act. In 1998, Van der Walt examines section 5 of the Gatherings Act that creates a limitation on the constitutional right to freedom of assembly and expression. The author finds that this limitation is reasonable and justifiable in terms of section 36 of the Bill of Rights, as it serves to protect a compelling state interest.[41] Khumalo scrutinises the common-law offence of public violence as the major measure dealing with gatherings in South Africa. He finds that the apparent failure of the crime of public violence to adequately safeguard the rights of non-protesters during violent protests means that the crime falls short of the objectives of section 39(2) of the Constitution, and thus requires to be developed in order to promote the spirit, purport and objects of the Bill of Rights.[42] Moses, again, investigates the primary reason for the promulgation of the Gatherings Act as a new legislative framework which was to repeal certain statutes that heavily restricted the ability of people to protest before and during apartheid. His principal inquiry relates to whether the definition of a gathering in the Gatherings Act extends to privately owned property. His conclusion is that the Gatherings Act encompasses gatherings held on privately owned property in certain circumstances. It is found that while the Gatherings Act may permit a deprivation of property, this dispossession may be justified, depending largely

38 US Department of the Army *Civil disturbances* 1-1.
39 Heymann *Towards peaceful protest in South Africa* 4.
40 Goldstone *Fifth interim report* 107.
41 Van der Walt *The effect of the 1996 Constitution on section 5 of the Regulation of Gatherings Act* 1-2.
42 Khumalo *Re-opening the debate on developing the crime of public violence* iv.

on the content of the gathering itself.[43] The last study encountered highlighted students' right to demonstrate at South African universities. In his master's study, Nantege examines the #FeesMustFall student protests that transpired at South African universities, as well as cases of private security guards and police using force to disperse persons assembled and gathered peacefully and unarmed. This is contrary to the Gatherings Act which states that gatherings should be disbanded forcefully only under the most extreme of conditions – where there is no other way of guaranteeing public safety, and when the protestors have been warned to disperse. The writer furthermore examines the scope of the students' right to demonstrate as per international law and the Constitution.[44]

There have been quite a few articles written on the subject; however, not many are centred specifically on discussing the law itself. In one of the earliest articles on gatherings, Du Pisani, Broodryk and Coetzer[45] examine peaceful procession as a substantive human right. This article is written against the background of a countrywide spate of anti-apartheid protest marches in 1989. These peaceful marches became the symbol of the so-called 'new South Africa'. At that time, South Africa did not have a Constitution guaranteeing freedom of expression as a fundamental human right, which includes the right of assembly and procession. The authors consequently present a historical analysis of protest marches during the pre-apartheid period, the 1950s, the 1960s and 70s, and the 1980s. The critical role-players in such protest marches as well as the political function thereof are examined. The authors predict that protest marches will form part of the South African political scene for a considerable time, which is indeed the case.

Dlamini[46] is one of the first researchers to direct attention to the regulation of mass protests by the Gatherings Act. His article reviews the South African court cases dealing with the constitutional right to protest, and whether the outcomes of these cases are in congruence with the provisions of the Act and the Constitution. It is established that the Gatherings Act bestows on police unrestricted powers to prohibit a protest without providing any reason for the prohibition. It is further found that these

43 Moses *"Gathering" on privately owned property* iii-iv.
44 Nantege *Students' right to demonstrate at South African universities* 8.
45 Du Pisani, Broodryk and Coetzer 1990 *The Journal of Modern African Studies* 573-602.
46 Dlamini 2009 *African Journal of Rhetoric* 86-107.

officers have little or no understanding of the content of the Act. The author contends that the Gatherings Act functions as a mechanism of the state whereby the right of the public to protest is violated. In an article examining whether the Gatherings Act regulates gatherings or restricts freedom of speech, Hjul[47] critically reviews this South African legislation, and probes public violence and the consequences thereof. The value of public marches as contributing to the developing of democracy, and the function and role of the courts in promoting freedom of expression and association are determined. The writer's conclusion is that the Gatherings Act should be amended to better protect freedom of expression and association.

In her article, Chamberlain[48] assesses the case of *SATAWU and Another v Garvas and Others*[49] in order to show the striking similarities in the implementation of the enabling rights to protest and access to information in South Africa. In a follow-up article by Chamberlain and Snyman[50] on the freedom of expression as an inherent quality of an open and democratic society (including freedom of assembly as provided for in the Bill of Rights), the cases of *S v Mamabolo*[51] and the *South African National Defence Union v Minister of Defence*[52] are evaluated. In especially the second judgment, the court stressed the fact that the right to assemble and protest must be valued as a guarantor of democracy. This right implicitly recognises and protects the moral agency of individuals in South African society, and facilitates the search for truth by individuals and society generally.[53]

In an article involving procedural issues pertaining to the Gatherings Act, Omar[54] explains the process for a lawful protest, which primarily involves three components, as stated in the Gatherings Act. These are the provisions that ought to apply prior to a protest taking place; the conduct during gatherings and the powers of the police during a protest; and the post-protest phase, namely the liability for damages, and

47 Hjul 2013 *De Jure* 451.
48 Chamberlain 2016 *AHRLJ* 365-384.
49 *South African Transport and Allied Workers Union/Congress of South African Trade Unions (SATAWU) and Jacqueline Garvas and Others,* Case CCT 112/11 [2012] ZACC 13 (hereinafter *SATAWU*).
50 Chamberlain and Snyman 2017 *SA Crime Quarterly* 7-20.
51 *S v Mamabolo (E TV Intervening)* 2001 (3) SA 409 (CC) paras [2], [28].
52 *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 para [8].
53 As per O'Regan J in *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 para [7].
54 Omar 2017 *SA Crime Quarterly* 21-31.

offences and penalties.

One of the most recent articles, that of Barrie,[55] is a critical case law discussion of *Mlungwana,*[56] where the court declared section 12(1)(a) of the Gatherings Act unconstitutional, and set aside the protesters' convictions and sentences. Section 12(1)(a) of the Gatherings Act criminalises a failure to give notice for convening a gathering. The author examines whether this section is in conflict with section 17 of the Constitution, which guarantees freedom of assembly, as it limits that freedom. This study will also evaluate and deliberate on this section.

Most of the research completed on gatherings consist of criminal justice or law-enforcement perspectives on the topic. For example, Pearce[57] investigates the policing of public violence after the new constitutional dispensation in two selected towns. The public in these towns were protesting against poor service delivery, and the writer finds that the SAPS' handling of public violence was reminiscent of the military style of the former political oppressors. It is recommended that a preventative, inclusive community policing style should be introduced to address public violence. In an article on the similar topic of policing gatherings, Iwu and Iwu[58] consider the policing of protests by the police in order to ensure the safety of lives and that the protests remain peaceful. Unfortunately, lives are lost in such protests, and the study probes the reason why this happens, as well as whether there are any interventions that need to be in place so as to curtail the high rate of casualties during protests. A serious requisite to review public order policing is suggested.

Research in the above texts, as well as in reports, have furthermore revealed that perceptions of police crowd management and control are contradictory – the police see their actions as restrained and disciplined efforts to deal with 'unruly and dangerous mobs', whereas participants in political gatherings commonly view police action as 'provocative and violent'.[59] At present, the police force in South Africa enjoys little credibility and trust in the townships because of the politicised role the SAPS has

55 Barrie 2019 *Journal of South African Law* 405-418.
56 *Mlungwana* paras [1]-[111]. See discussion in para 3.4 below.
57 Pearce *A preventative policing style for public violence* 3-8.
58 Iwu and Iwu 2015 *The Scientific Journal for Theory and Practice of Socio-Economic Development* 541-552.
59 Institute of Criminology *Crowd management: Civilian and police conduct* 1.

played historically. In their study, Rauch and Storey[60] examine the policing of public gatherings and demonstrations from the year 1960 to 1994. In the early 1960s, a specialised police unit tasked with riot control to suppress any political protest associated with resistance to apartheid was created. Although the name of the unit changed in the next three decades, the function of this unit remained the same. The police thus played a prominent role in enforcing apartheid policies.

In 1992, the Institute of Criminology conducted fieldwork in rural areas as regards the communities' perception of the police. The results show that substantial numbers of township dwellers see the police as being biased, that is 'super-effective' when dealing with opponents of the state, but totally inactive when violence is perpetrated by rivals of the ANC. The poor record of arrest and successful prosecution of those involved in political violence further undermines these people's confidence in the SAPS.[61] A contradiction seems to exist in the way in which the police employ force in situations of public disorder: excessive force is frequently used in dealing with peaceful, illegal political gatherings, whereas the police commonly fail to intervene forcefully when civilian groups are engaged in conflict with one another. Three decades later, the situation has not changed much.

Demonstrations, assemblies, pickets and petitions have been debated on at length in the literature of other jurisdictions. This research will consider the legislature of countries such as England and India, amongst others, in order to compare their operational plans as to gatherings with that of South Africa. Many jurisdictions follow international and regional guidelines in regulating assemblies. As such, this study will also incorporate these guidelines.

1.6 Outline of research

This study will not involve the history of assemblies in South Africa before 1990. The starting point will be the recommendations of the Goldstone Commission, the Constitution, and the Gatherings Act. The focus will be on the way forward.

60 Rauch and Storey *The policing of public gatherings and demonstrations* 1.
61 Institute of Criminology *Crowd management: Civilian and police conduct* 3.

The introductory chapter, Chapter one, has set the background to the study, and has provided some background information to set the scene of the research. The problem statement, the research questions and hypotheses, the research methodology and limitations of the research are explained. A short literature review in order to comprehend the topic more competently is provided.

In which manner the conduct of the government and participants of gatherings must be qualified, is demonstrated in Chapter two, with reference to the facts of cases and applicable guidelines of regional and international instruments. According to the Constitution, international law is applicable in South Africa.[62] This chapter focus on the following instruments – the International Bill of Human Rights which consists *inter alia* of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR),[63] the African (Banjul) Charter on Human and Peoples' Rights (hereinafter referred to as the African Charter)[64] and the European Human Right System.[65] The facts of relevant international and regional case law will be examined so as to illustrate how and when the right to gather can be limited.

In Chapter three, the constitutional application with regard to the right to gather is investigated and the activities protected by the Constitution are discussed. The Constitution also provides that the right to gather can be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society.[66] Clear and well-drafted legislation on gatherings will support the government in protecting this right for everyone to enjoy. Similar legislature in other countries will be considered to establish if South Africa has the best model to manage assemblies.

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62 See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) paras [95]-[98], where the Constitutional Court explained the relevance of international law to the South African constitutional framework. The Constitution s 39 directs that when interpreting the Bill of Rights, a court must consider international law – and may consider foreign law.

63 Roberts *The contentious history of the International Bill of Human Rights* ix. The Universal Declaration of Human Rights Act, 1948 (UDHR) was ratified by South Africa on 24 October 1945. The UDHR is a standard for individual human rights. The ICCPR entered into force on 23 March 1976, and was ratified by South Africa on 10 December 1998.

64 The African (Banjul) Charter on Human and Peoples' Rights was adopted on 27 June 1981, and entered into force on 21 October 1986. It was ratified by South Africa on 9 July 1996.

65 Most of the case law and guidelines linked to these instruments are similar in many respects and can be deemed as universally acceptable.

66 Section 36.

Chapters four to six deal with offences generally utilised by the prosecution of cases relating to dissent, mass-action or protest. Offences utilised as public order offences[67] include offences under the Gatherings Act,[68] public violence,[69] sedition, offences under the Trespassing Act 6 of 1959, offences under the Riotous Assemblies Act 17 of 1956, offences under the National Road Traffic Regulations 2000,[70] and offences under the Intimidation Act 72 of 1982. These offences constitute a piece meal of legislation and common-law offences. Some of these offences were never intended to be applicable to gatherings. Participants are, therefore, never certain, when arrested, to what charges they will need to answer.

In Chapter four, the offences under the Gatherings Act are discussed. In South Africa, the Gathering Act regulates the holding of public gatherings and demonstrations. The provisions inform the public where to notify the authorities and the procedures to be followed. The Gatherings Act will be examined as to problems experienced with the implementation of the Act on a daily basis. The question is investigated if these offences are still relevant in the South African context, and whether it will withstand constitutional scrutiny.

In Chapter five, the common-law offence of public violence is discussed. The offence is essentially the only offence to prosecute the violent and unlawful conduct of a group of people in South Africa. It is utilised by the state to curb gatherings that are not peaceful and unarmed. A wide range of conduct falls into the definition of public violence. It is argued that the offence of public violence is not clearly defined, and hence cannot legitimately be regarded as a criminal offence.

Chapter six focuses on offences that relate to the right to gather. Depending on the circumstances, several other offences can be committed during a gathering, for example, assault, malicious damage to property, arson, murder, or even sexual assault. The offence of sedition is intended to suppress revolutionary calls for political and social reform,[71] but governments can misuse this offence to oppress any criticism

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67 Snyman *Snyman's criminal law* 277 categorises public violence as an offence against the state, and trespassing as an offence relating to damages to property. Burchell and Milton *Principles of Criminal law* xi categorise public violence under offences against the community interest.

68 See Chapter 4 below.

69 See Chapter 5 below.

70 Published in *GG* 20963 dated 17 March 2000, *GN* R225.

71 Burchell and Milton *Principles of Criminal law* 683.

against the government, leadership or political parties. The Trespass Act 6 of 1959 prohibits the entry or presence upon land and buildings.[72] Currently, the Act is utilised as an important tool to combat violent protest action, land invasion[73] of state or private property, and to restore public order. The Riotous Assemblies Act 17 of 1956 is clouded in controversy, as it is seen as stemming from apartheid-era law, it is out-dated and historically used to prosecute liberation fighters.[74] Section 18 of the Act provides for attempt, conspiracy and inducing another person to commit an offence. This section is utilised in South Africa daily for many offences, not only for public-order offences. Offences under the National Road Traffic Regulations 2000 are applied by the government when gatherings take place on public roads.[75] When gatherings are violent, it is difficult to prove that that all the participants act in concert and committed the offence of public violence. It is easier to hold individuals or smaller groups accountable for certain conduct, for example, hindering or obstructing traffic on public roads.[76] In South Africa, intimidation is frequently part and parcel of conduct at a gathering.[77] Although it is well known that intimidation is rife in South Africa, very few people seem to be prosecuted for the offences created in this Act.[78] It is suggested that the government creates new offences for different situations with applicable sentences.

In Chapter seven, the recommendations in Chapters two to six are summarised. It is proposed that the government revisits the mixture of current offences utilised by the prosecution during dissent, public violence or protest action, and that specific public order offences are created that provide for specific unlawful conduct with corroborating sentences. Although some countries have codified public order criminal law, South Africa did not follow the route. The government is urged to consider organising applicable public order offences in a single public order act. Existing guidelines from

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72 See para 6.3 below.

73 Definitions for land invasion and land grabbing in the South African context are not available. Both terms are used in the media and sometimes have the same meaning. 'Land invasion' includes "both state and privately-owned land unlawfully entered by people (who is destitute or do it purely for financial gain)". 'Land grab' is seen as more sinister. It is a "very large-scale land acquisition by means of nationalisation; it could involve abuses, force or violence." See South African Government https://www.gov.za/services/place-live/how-respond-land-invasion (Date of use: 22 November 2020).

74 See para 6.4 below.

75 See para 6.5 below.

76 Regulation 319.

77 See para 6.6 below.

78 Snyman *Snyman's criminal law* 455.

applicable international and regional instruments which direct and monitor executive conduct must be included since these guidelines qualify public order offences, and inform participants of gatherings what conduct is deemed unacceptable by the government, and the consequences of not adhering to it. The changing society and new modern technology also need to be considered in reforming public order offences.

1.7 Summary

This chapter focused on providing a general background to the predicament of regulating and policing gatherings in South Africa. Although gatherings are protected by section 17 of the Constitution, there are rights and responsibilities involved in exercising this right by the individual as well as the state. Assemblies should also be peaceful in order to claim this right. As seen from the background information provided above, many gatherings turn violent with a subsequent loss of life. Participants of such gatherings also run the risk of being arrested for committing certain offences. This study will examine the current legislation and common-law offences utilised to curb public disorder in South Africa. The main statute regulating the holding of public assemblies and gatherings is the Gatherings Act. This Act will be thoroughly investigated as it contains many vague and presumably unconstitutional provisions.

Since South African courts need to take cognisance of applicable international law, it is important that the police, prosecutors and judiciary are well versed in its application with regard to the right to gather. An arrested, prosecuted or guilty individual may still refer his or her complaint to an international or regional instrument for conclusion. It is consequently beneficial to identify the instances where international or regional instruments recognise that governments violated the right to gather, and when it constitutes an unjustified limitation. It is, therefore, debatable whether correct decisions can be made by the state without adhering to these guidelines and principles.

As such, a qualitative, comparative research methodology will be employed to compare South African offences as regards gatherings with the comparable offences from selected foreign jurisdictions, international and regional guidelines, and case law in other legal systems. The proper facilitation of gatherings can prevent violence,

ensure that fewer participants are arrested, and influence the judgments of courts. In the following chapter, the relevant guidelines pertaining to gatherings under international and regional instruments will be discussed in more detail.

CHAPTER TWO

INTERNATIONAL AND REGIONAL INSTRUMENTS GOVERNING THE RIGHT TO ASSEMBLE

2.1 Introduction

When people gather, be it peacefully or violently, participants run the risk of being arrested for committing an offence. The way the government of the day reacts to gatherings has an influence on the policing, prosecution and adjudicating of offences stemming from the right to gather.[1] Due to the constitutional spirit, the South African government has the duty to assist and enable its citizens to assemble peacefully and unarmed, while citizens again must utilise the right to assemble peacefully and in a responsible manner. The offences that stem from gatherings differ from other offences, since the right to gather is qualified by a host of guidelines and principles in both regional and international instruments, as well as in case law.

South Africa is party to various international and regional instruments. The Constitution directs that international and foreign law is applicable in South Africa,[2] and that courts, when interpreting the Bill of Rights, must consider international law, and may consider foreign law.[3] Therefore, it is important to recognise instances when an international or regional instrument has already identified a situation in which the right to assemble was violated by a government.

This chapter focus on the following instruments which South Africa has either ratified or signed: The International Bill of Human Rights which consists *inter alia* of the UDHR and the ICCPR.[4] South Africa is also a party to the African Charter.[5] This is a regional

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1 For the purpose of this study, the right to gather includes assemblies, demonstrations, pickets, petitions, rallies, marches, and so on.

2 See *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347(CC) paras [95]-[98], where the Constitutional Court explained the relevance of international law. Regional law is assumed to be included in these concepts. See also Chapter 1 footnote 62.

3 Section 39 as in para 2.2 below. See also Mubangizi 2004 *TSAR* 324; Rodger 2002 *Journal of South African Law* 1.

4 Roberts *The contentious history of the International Bill of Human Rights* ix. See also Chapter 1 footnotes 63-65.

5 African (Banjul) Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5; 1982 (21) ILM 58), adopted 27 June 1981, entered into force 21 October 1986. It was ratified by South Africa on 9 July 1996.

instrument that most African states have signed. The UDHR and ICCPR confirm the right to peaceful assembly as a human right, and this right is also guaranteed by the South African Constitution. These instruments also adopted guidelines that assist states in complying with international legal norms and standards. Certain guidelines aid with the interpretation of legislation governing the right to gather. A signatory state's willingness to play its part when ratifying an international or regional instrument plays a detrimental role in terms of an individual enjoying the rights guaranteed in the instrument.[6]

Although South Africa is not a signatory to the European human rights system, it has an abundance of case law on the right of assembly. In particular, the *Guidelines on freedom of peaceful assembly*[7] gives meaningful context to the application of the right to assemble or gather. South African courts may take cognisance of the decisions of the European Court of Human Rights (ECtHR) when adjudicating cases that stem from the right to gather, since the Constitution provides that, for the purpose of interpretation, international instruments are applicable; thus, the courts are not confined to only referring to instruments that are binding on South Africa.[8]

Although international and regional instruments provide South African courts with case law and guidelines, this guiding material is generally not part of the training courses provided to police officials, prosecutors and magistrates, since most are unaware of the existence of these documents.[9] Court decisions are made daily without relevant case law and guidelines being considered. Most of the case law and guidelines that are linked to the different instruments are similar in many respects, and can be deemed as universally acceptable; thus, it is debatable whether correct decisions can be made without adhering to these documents. Therefore, it is important to identify situations that constitute unjustified restrictions on the right to assemble peacefully. These principles established by international and regional instruments may also suggest a

6 See Meyersfeld 2013 *Constitutional Court Review* 399-416.

7 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2019 13-14. These guidelines were compiled by the Venice Commission, the Organisation for Security and Co-operation in Europe (OSCE), and the Office for Democratic Institutions and Human Rights (ODIHR).

8 Currie and De Waal *The Bill of Rights handbook* 147.

9 As gathered from 30 years' personal work experience in criminal prosecution by the researcher, a senior public prosecutor employed by the NPA.

positive normative[10] framework that could assist when dealing with evidence of human rights' violations.

How the conduct of the South African executive and participants of gatherings should be qualified, is demonstrated in this chapter, with reference to the facts of cases and applicable guidelines of regional and international instruments. This is important, since proper facilitation of participation in peaceful assemblies can prevent violence, ensure that fewer participants are arrested, and influence the judgments of courts. The discussion on the right to assemble as established in both international and regional law will begin by locating these principles as found in the Constitution, and also indicating the importance of these laws for South African jurisprudence. Lastly, selected international and regional guidelines on gatherings will be deliberated on.

2.2 Constitutional principles on the application of international, regional and foreign law in South Africa

Sections 39, 231, 232 and 233 of the Constitution provide for the application of international and foreign law in South Africa. However, the Constitution also reflects the influence of a variety of international human-rights instruments.[11] When provisions derived from international instruments are included in the Constitution, it can be seen as a powerful method of incorporating international human rights into national law.[12] For example, the court in *Centre for Child Law v Minister of Justice and Constitutional Development and Others*[13] confirmed that international law is applicable in South Africa since the Constitution "embodies internationally accepted principles".[14] In the preamble to the Constitution, provision is made for a "democratic South Africa able to take its rightful place as a sovereign state in the family of nations".[15] These statements

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10 See Daci 2010 *Academicus International Scientific Journal* 109 where he states that "a norm or a legal principle is a prevailing standard or set of standards of behaviour or judgment assumed to be just standards of behaviour for a society or for humanity in its entirety".

11 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 32 75, which may also include international declarations, covenants and conventions.

12 According to Venter *Global features of Constitutional law* 11: "constitutional law has changed in character from a relatively insular discipline bounded by the nation-state's operation within its own territorial jurisdiction, to a field of law which has been opened up to influences of a multitude of other disciplines and which has grown into a vehicle for notions migrating into the constitutional domain of all states as well as into the world of inter-state relations and international governance."

13 2009 (2) SACR 477 (CC).

14 Paras [62]-[63], [101].

15 Constitution Preamble.

confirm that it is essential that the interpretation of national law must concur with international law.

Section 39 of the Constitution provides for the manner in which the Bill of Rights must be interpreted; in that international law[16] must be considered; and that foreign law may be considered:

> (1) When interpreting the Bill of Rights, a court, tribunal or forum –
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

A court, therefore, must endorse the values that underlie an open and democratic society, which are based on human dignity, equality and freedom. When a court interprets any legislation that relates to offences that stems from the right to gather, the court must give preference to any reasonable interpretation that is consistent with international law. In *Law Society of South Africa and Others v President of the Republic of South Africa and Others,*[17] the court indicated that international law is central in shaping South Africa's democracy.[18] Therefore, interaction between international and national law happens regularly.[19] International law has featured in a wide variety of cases during the first ten years of South Africa's democracy,[20] and especially in the first few years after the South African Constitution became operational.[21] Former Deputy Chief Justice Moseneke[22] indicated that:

> It is no exaggeration to observe that our decisions read like works of comparative constitutional law and, where appropriate, we have not avoided relying on foreign judicial dicta or academic legal writings in support of the reasoning we resort to or conclusions we reach. Even so, it is fair to say that our burgeoning jurisprudence owes much debt to judicial reasoning emanating from other democratic jurisdictions and, in particular, the Commonwealth, the European Court of Human Rights, the European Court of Justice and certain African jurisdictions… We are more likely to find credible and dependable guidance from the collective wisdom of

16 See Chapter 3 below, Dugard *International law: A South African perspective* 24-41.
17 2019 (3) SA 30 (CC).
18 2019 (3) SA 31.
19 Section 39(2).
20 Botha and Olivier 2004 *SAYIL* 42-77.
21 Botha and Olivier 2004 *SAYIL* 42-77. See s 35 of the 1993 and s 39 of the 1996 Constitutions.
22 Moseneke 2010 *Advocate* 63.

> the family of nations than from the likely breaches of the rule of law within domestic, legal and constitutional arrangements.[23]

Accordingly, international law is part of South African law, and with regard to criminal law, it is utilised specifically for the purpose of interpreting rights guaranteed in the Constitution. South African offences concerning the right to gather must, therefore, conform to international law.

Section 231 of the Constitution details how and when international agreements are applicable:

> (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.[24]

The common core of human rights can be found in instruments such as the ICCPR, the European Convention on Human Rights (ECHR), the American Convention on Human Rights, and the African Charter. These instruments are testimony to human rights being a legitimate concern and part of the international legal system.[25] Although South Africa is a signatory to many international human rights agreements, South African courts are not confined to instruments that are binding on the jurisdiction when interpreting international human rights law.[26] However, when courts compare law,

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23 Moseneke 2010 *Advocate* 63-65. See also Woolman, Bishop and Brickhill (eds) *Constitutional law of South* 32 175; Rautenbach 2015 *PELJ* 1546-1550.

24 Mavedzenge 2013 *Cornell International Law Journal Online* 99-102 states: "Apart from playing an interpretive role, the application of international law in South Africa can also be more direct. An international agreement that South Africa has ratified can apply as domestic law. However, under section 231(4), the agreement must either be self-executing or enacted into domestic legislation… For agreements that are not self-executing, there are two distinct stages: ratification and enactment as legislation."

25 Barry 2015 *SAYIL* 103.

26 Currie and De Waal *The Bill of Rights handbook* 147.

regard must be given to the South African legal system, its history and the language of the Constitution.[27]

Section 232 of the Constitution provides that customary international law is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament. The Constitutional Court still needs to interpret the law to ensure that the resulting national law is consistent with the Constitution.[28] When applying international law, section 233 determines that a court must give preference to any reasonable interpretation of the legislation that is consistent with international law, rather than to any alternative interpretation that is inconsistent with international law.[29] This section is applicable in circumstances where there is available international law to be considered with regard to the question before the court.[30] It constitutes an error in law when applicable international law is obtainable, but not observed.[31] International law is, therefore, binding in the sense that due regard must be given to it.[32] When South Africa ratifies a treaty, it is obligated by international law to respect the provisions of the treaty.[33]

International law is a vibrant, developing force, and the latest developments must always be taken into consideration.[34] International law is a clear feature in the South Africa's legal system, and society has been enriched by the courts' use of its principles and precepts.[35] In the following paragraphs, the significance of international and regional law will be focused on in more detail.

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27 *S v Makwanyane* 1995 (3) SA 391 (CC) para [39].

28 Constitution s 232: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". See also Dixon, McCorquodale and Williams *Cases & materials on International law* 103.

29 Constitution s 233: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

30 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 32 182. See *S v Baloyi* 2000 (1) BCLR 86 (CC), 2000 (2) SA 245 (CC) para [13].

31 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 32 183.

32 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 32 176. See *S v Makwanyane and Another* 1995 (3) SA 391 (CC); *Azanian People Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Ex parte Gauteng Provincial Legislature, In re: Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); *S v Basson* 2005 (1) SA 171 (CC); *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); *Sidumo and Another v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC); *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 (6) SA 632 (CC).

33 Woolman, Bishop and Brickhill (eds) *Constitutional Law of South Africa* 30 10.

34 Botha and Olivier 2004 *SAYIL* 75.

35 Botha and Olivier 2004 *SAYIL* 77.

2.3 The importance of international- and regional law in South Africa

South Africa's Constitution can be seen as an international law user-friendly constitution, finding guidance from international law, in order to determine the content of South African law.[36] As indicated in paragraph 2.2, South African domestic legislation must not only conform to the Constitution, but also to international instruments ratified by the state. This legislation must balance the right to gather peacefully with the facilitation of the right. The government has a constitutional duty to ensure that all South African people enjoy their basic rights. In *S v Makwanyane and Another,*[37] Chaskalson J stated that international and foreign authorities are valuable, since they analyse arguments for and against what is disputed, and show how other courts deal with issues.[38] However, it must be remembered that courts must interpret the South African Constitution, and not the international instrument. To refuse any comparative review with foreign constitutions "would be to deprive the legal system of the benefits of the learning and wisdom to be found in other jurisdictions".[39] According to Ackermann, foreign law "creates room for creative imagination, and raises new questions, possibilities and solutions to old problems".[40]

Therefore, international or regional instruments influence the approach taken by South African courts when interpreting the common law or legislation pertaining to offences stemming from the right to gather. In *Mlungwana,* the Constitutional Court took cognisance of international law.[41] The declaration made by the High Court that section 12(1)*(a)* of the Gatherings Act was unconstitutional, was confirmed to the extent that it is a criminal offence for any person convening a gathering to either fail to give notice or to give inadequate notice of the intended gathering.[42] The decision was in consensus with the findings of influential international and regional instruments,[43] for example, the decision made by the UNHCR in *Kivenmaa*[44] demonstrated that such

36 Tladi 2018 *SALJ* 707-708.
37 1995 (3) SA 391 (CC).
38 Para [34].
39 *K v Minister of Safety and Security* 2005 (9) BCLR 835 (CC), 2005 (6) SA 419 (CC) paras [34]-[35].
40 Ackermann 2006 *SALJ* 508. Comparative law has proved instructive and helpful in the jurisprudence of the Constitutional Court in many different areas, see the list on 510-513.
41 See, e.g. para [48].
42 See Chapter 4 below, as well as footnote 16 in Chapter 1.
43 *Mlungwana* paras [48], [51].
44 *Kivenmaa v Finland* (Communication no 412/1990 CCPR/C/50/D/412/1990).

criminalisation limits the right in article 21 of the ICCPR.[45] The court also referred to the right to freedom of assembly under the ECHR, where the Grand Chamber of the ECtHR held that the right to freedom of assembly is a fundamental right and one of the foundations of a democratic society; therefore, it must not be interpreted restrictively.[46]

Although a host of informative guidelines and material from international and regional instruments are available in and applicable to South African court cases, it is generally not included in the training courses of the executive authorities, and does not form part of the criminal-law courses for law students. In addition, it can be time-consuming to search for guiding material. Available sources of guiding principles are therefore neglected. Specifically, the guidelines created from experience and gathered by international and regional instruments with regard to assemblies are valuable to qualify the conduct of the executive. Meaningful decisions and guidelines are available to guide participants and governments on the subject of the right to gather peacefully. These instances constitute guidelines that affect how the police, prosecutors and the judiciary exercise their discretion to arrest, prosecute or adjudicate assemblers. These directives may not be ignored, and gatherings in South Africa cannot be dealt with in isolation. Guidelines may assist the police to facilitate gatherings properly and to minimise violent conduct by participants. These principles lay a normative framework for the state's executive powers to operate within, and thus act as a standard against which the conduct of the executive power can be tested. Although South Africa has a high number of protest action taking place almost on a daily basis, it does not have a wealth of decisions on this right, while international and foreign case law and constitutionally sound guidelines already exists. South Africa can look towards international law in developing their jurisprudence, and also in guiding the state on the subject of guaranteeing human rights and solving legal problems. The guidelines on international and regional law as regards gatherings consequently needs to be examined more closely, as in the following paragraphs.

45 *Mlungwana* paras [48]-[49].
46 *Mlungwana* para [51].

2.4 International and regional guidelines on gatherings

This section focuses on guidelines and principles derived from international and regional instruments; specifically, under the international Bill of Rights, the African Charter and the ECHR. These instruments take cognisance of each other, and show conformity with regard to guidelines and case law when facilitating gatherings, therefore, the principles can be deemed as being universally acceptable. These human-rights systems adopt and publish guidelines to inform member states and civil society of their responsibilities towards the right of freedom of assembly. For South African jurists, the facts of international and regional case law on gatherings are also important in establishing when and what restrictions may be placed on the right to gather peacefully (when the state decides to arrest and prosecute participants of gatherings). In the following paragraphs, under each guideline, the background will first be provided on the particular international or regional instrument, where after the guidelines and examples on peaceful assemblies will be specified and discussed.

2.4.1 Guidelines under the Bill of Human Rights

The International Bill of Human Rights includes the UDHR, which declares itself "a standard of achievement for all peoples and all nations."[47] By signing the UDHR, member states aim to promote universal respect for human rights and fundamental freedoms, in co-operation with the United Nations (UN).[48] Although the UDHR is not a legally binding document, it provides that "everyone is entitled to all rights and freedoms, without distinction of any kind,"[49] and that "everyone has the right to freedom of peaceful assembly and association."[50] The UDHR is the basis for two binding treaties;[51] the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three documents form the foundation of the modern system of international human rights.[52] For purposes of this chapter, the ICCPR is extremely important. Article 21 of the ICCPR provides that:

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47 UDHR Preamble.
48 Preamble of the UDHR.
49 Article 2 of the UDHR.
50 Article 20(1) of the UDHR, Preamble. See also Dugard *International law: A South African perspective* 325.
51 Roberts *The contentious history of the International Bill of Human Rights* ix.
52 Roberts *The contentious history of the International Bill of Human Rights* ix.

> The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

States that are party to the Covenant are, therefore, obligated to promote human rights and freedoms, while individuals have a duty and responsibility to other individuals and to the community.[53] In terms of article 21 of the ICCPR, the right to peaceful assembly can only be limited in conformity with the law of a state; or when necessary in a democratic society, and when it is in the interests of national security, public safety, public order, the protection of public health, the protection of morals, and the protection of the rights and freedoms of others. These restrictions are of a general nature. States can use their own discretion to interpret the restrictions to their benefit. However, any restriction on the right to peaceful assembly must be necessary and proportional.

Any state party to the Covenant may issue a written communication to another state party if the state is not adhering to the provisions of the ICCPR.[54] The ICCPR establishes a Human Rights Committee[55] (HR Committee) to assist with these matters.[56] The HR Committee deals with matters only if all the available domestic remedies have been exhausted.[57] The Committee may, when the matter is not solved to the satisfaction of the state parties, appoint an *ad hoc* Conciliation Commission after obtaining the prior consent of the state parties to investigate the matter.[58] The HR Committee appointed its first working group in 1960 to examine human rights violations in South Africa, thereafter, special procedures were implemented to provide for individual complaints.[59]

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53 See Art 2 of the ICCPR. South Africa signed the Covenant in 1994, and ratified it in 1998. The Optional Protocol to the ICCPR was ratified by South Africa in 2002. See UN https://indicators.ohchr.org/ (Date of use: 8 July 2020).

54 Article 41(a) of the ICCPR.

55 Article 28 of the ICCPR.

56 Article 41(b) of the ICCPR.

57 Article 41(c) of the ICCPR. This is not the rule where domestic remedies are unreasonably prolonged. In *Khadija v Netherlands* (Communication no 1438/2005 CCPR/C/88/D/1438/2005 15 November 2006), Khadija claimed *inter alia* a violation of art 21, since he was denied the right of peaceful assembly. Netherlands challenged the admissibility of the communication, arguing that Khadija did not exhaust the domestic remedies. The communication was ruled inadmissible, see paras [2.1]-[2.7].

58 Article 42(1) of the ICCPR.

59 Roberts *The contentious history of the International Bill of Human Rights* 556-559; Dugard *International law: A South African perspective* 329-330.

When a violation of a right under the Covenant is established, the HR Committee has the power to instruct a state to provide the complainants with a remedy which includes, amongst others, reimbursement of legal costs, payment of the value of the fine paid, compensation, steps to prevent similar violations, and to ensure that legislation conforms to the provisions of the Covenant.[60] Therefore, it would appear that the HR Committee makes recommendations and hopes that the state party will act on these.

Although the ICCPR provides that state parties and individuals may refer matters to the HR Committee, it stays a concern that the Committee does not have any real powers to compel states to conform to its suggestions. There is a possibility that the state parties may choose to ignore the suggestions.[61] For example, in *Turchenyak and Others v Belarus,*[62] Turchenyak and the other petitioners claimed that their right to peaceful assembly (guaranteed under article 21 of the Covenant) was restricted. The government of Belarus argued that they did not consent to an extension of the HR Committee's mandate that communications may be submitted by a third party (lawyers and other persons) on behalf of individuals who alleged a violation of their rights.[63] On this basis, Belarus declined to react to the communications.[64]

It appears that the procedure to be followed under the instrument can be time-consuming, and that decisions are being made by the HR Committee long after the actual incident took place. In practice, a person could be sentenced to death (in countries where the death penalty is still applicable) before the Committee makes a finding.

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60 *Govsha v Belarus* (Communication no 1790/2008 CCPR/C/105/D/1790/2008 14 September 2012) (hereinafter *Govsha v Belarus*); *Poliakov v Belarus* (Communication no 2030/2011 CCPR/C/111/D/2030/2011 25 August 2014) (hereinafter *Poliakov v Belarus*); *Kovalenko v Belarus* (Communication no CCPR/C/108/D/1808/2008 26 September 2013) (hereinafter *Kovalenko v Belarus*).

61 In *Tanganyika Law Society & Another v Tanzania* (Application 009/2011 consolidated with *Mtikila v Tanzania* Application 011/2011). See Enabulele 2016 *AHRLJ* 2.

62 *Turchenyak and Others v Belarus* (Communication no 1948/2010 24 July 2013) (hereinafter *Turchenyak and Others v Belarus*).

63 *Turchenyak and Others v Belarus* para [1].

64 *Turchenyak and Others v Belarus* para [1].

2.4.1.1 Guidelines on peaceful assemblies under the Bill of Human Rights

To protect and promote human rights in the context of peaceful assemblies, the HR Committee developed a *General Comment* on article 21 of the ICCPR.[65] The HR Committee gained valuable experience by reviewing the reports and communications on gatherings of several states. The aim of the *General comment* is to provide appropriate and authoritative guidance to state parties and other actors on the measures to be adopted to ensure compliance with the rights protected under article 21. It is an interpretive document and standard against which domestic legislation and conduct of governments must be tested.

The *General comment* states *inter alia* that assemblies are an important means of participatory democracy; therefore, governments must ensure that this right is available to everyone.[66] It is further of importance that the right of peaceful assembly is an individual right that is exercised collectively.[67] Peaceful assemblies are a vital tool to bring concerns under the attention of the government; failure to recognise this right to gather is a marker of repression.[68] However, violent gatherings are not protected by article 21, but the other rights in the Covenant are still available to individual participants.[69] The *General comment* delineates violence as including physical force that is likely to result in injury or death, or serious damage to property. The mere pushing and shoving, or disruption of movement or daily activities do not amount to violence.[70] It is interesting to note that expressing oneself online is protected by article 21 of the Covenant.[71] As such, peaceful assemblies can take place online or rely on digital services, and state parties must refrain from blocking internet connectivity. Any restriction on information dissemination systems must conform to article 21 of the ICCPR.[72]

The document further provides that governments have constitutional duties in respect of peaceful assemblies; they must respect and facilitate peaceful assemblies, promote an enabling environment, protect participants' safety, and ensure accountability and

65 ICCPR *General Comment* 1-18.
66 ICCPR *General Comment* para [1].
67 ICCPR *General Comment* para [4].
68 ICCPR *General Comment* para [2].
69 ICCPR *General Comment* para [9].
70 ICCPR *General Comment* para [15].
71 ICCPR *General Comment* para [13].
72 ICCPR *General Comment* para [34].

remedies to victims of human rights violations.[73] States must further enact domestic legislation to regulate peaceful assemblies in order to comply with international human rights norms and standards, which creates a general framework for restrictions of the right.[74] The criminal justice system, for example, police members, must be properly trained, as they need to understand group dynamics and the importance of communication with participants and organisers. The intention of police members must always be to enable the assembly to take place as planned.[75] Lastly, the fact that peaceful assemblies may provoke violent reactions from the public is not a legitimate reason to prohibit a gathering.[76]

These comments were created to ensure the protection of human rights when people embark on peaceful assemblies. The *General comment* is not only a useful tool to assist state parties to comply with international human rights, norms and standards, but also has an educational purpose with regard to members of the public. It is clear that the right to assemble may not be disregarded by a government. The right needs to be facilitated to enable anyone to enjoy the freedom to gather.

In South Africa, protest action is the voice of the people, and sometimes the only opportunity to inform the government of problems experienced by the poor; therefore, assemblies must take place without unwarranted interference. Restrictions must not be implemented lightly, particularly in circumstances when legislation provides for the sanctioning of the failure to adhere to technical detail of arranging gatherings. The Gatherings Act, for example, provides that organisers may be prosecuted if they fail to attend a meeting called by the local authority after notification of a planned gathering.[77] When governments allow peaceful protests, they foster accountability, however, to only adhere to the recommendations of the *General comment* is not sufficient – governments need to be seen to listen and act on causes brought under their attention by members of the public.

2.4.1.2 Case law on violations of the right to peaceful assembly

The following communications are examples indicating how the HR Committee deals

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73 ICCPR *General Comment* paras [21]-[25]
74 ICCPR *General Comment* paras [36]-[40].
75 ICCPR *General Comment* paras [74]-[80].
76 ICCPR *General Comment* para [27].
77 Section 12(1)(b).

with violations of the right to peacefully assembly. Cognizance of these examples is important when South African courts deal with offences in respect of the right to gather. Most of the communications refer to or stem from complaints received from individuals in Belarus, where a lack of political will on the part of the state authority is identified to improve human rights.[78]

In *Govsha v Belarus*, Belarusian nationals claimed a violation of their right to peaceful assembly,[79] after the state prohibited a meeting of their organisation.[80] The meeting was banned due to the following reasons; (a) a meeting on a similar subject had already taken place; (b) contrary to the requirements of article 5 of the Law on Mass Events, the application was not accompanied by receipts confirming that services relating to the protection of public order and security, medical facilities and cleaning at the end of the meeting, had been paid;[81] and (c) contrary to the requirements of article 8 of the Law on Mass Events, an announcement about the meeting was published in the newspaper before the organisation obtained authorisation to organise the meeting.[82] The HR Committee noted that the state – by imposing procedures for organising a mass event – effectively placed restrictions on the right to freedom of expression and assembly.[83] Since the state failed to show why the restrictions were necessary,[84] the state was required to reimburse the applicants' legal costs, to pay compensation, and to take steps to prevent a similar violation.[85] A similar situation occurred in *Poliakov v Belarus*.[86] Poliakov applied to the Executive Committee of the City of Gomel to organise a demonstration in the form of a picket.[87] His request was rejected since the manner in which the demonstration would be conducted was not specified, and the application did not comply with Decision no. 299 of 2 April 2008 of

78 UNHRC *Report of the Special Rapporteur on the situation of human rights in Belarus* 1.
79 *Govsha v Belarus* para [1.1].
80 *Govsha v Belarus* para [3.1].
81 E.g., they did not provide receipts confirming that services relating to the protection of public order and security, medical facilities and cleaning at the end of the meeting had been paid. Sections 5 and 6 of the Law on Mass Events contain various requirements, such as measures for securing public order and safety at a mass event, measures connected with medical services and cleaning after an event, and so on.
82 *Govsha v Belarus* para [6.1].
83 *Govsha v Belarus* para [9.3].
84 *Govsha v Belarus* para [9.4].
85 *Govsha v Belarus* paras [11-12]. The HR Committee gave the state party 180 days to provide information about these measures.
86 *Poliakov v Belarus* (Communication no 2030/2011 CCPR/C/111/D/2030/2011 25 August 2014) (hereinafter *Poliakov v Belarus*).
87 *Poliakov v Belarus* para [2.1].

the Executive Committee of the City of Gomel, which states that:

> …public gatherings can only be organised if the organisers present a letter from the Department of Interior of the District Administration (to ensure public order during the demonstration), the Health Department (to ensure medical care during the demonstration) and the Utilities Department (to ensure cleaning of the area where the demonstration was to take place).[88]

Poliakov argued that the decision created considerable obstacles for organisers of public events, since documents from three separate public service departments had to be obtained, and public gatherings are only allowed at one location on the outskirts of the city.[89] The HR Committee observed that the restrictions imposed are burdensome,[90] furthermore, that the state did not demonstrate how a denial of the request to picket "constituted a proportionate interference with the right of peaceful assembly, i.e. that it was the least intrusive measure and proportionate to the interests the state sought to protect".[91] The state also failed to explain why Poliakov was not given an opportunity to amend his request, and to add the details omitted.

A government may, therefore, not prohibit a gathering because a similar meeting has taken place; or because an application to hold a gathering is not accompanied by receipts that confirm that services will be rendered; or because an announcement about the meeting is published before authorisation is obtained. These grounds constitute a violation of the rights of the participants if the state is not able to justify why the restriction is necessary. Additionally, the state must give organisers an opportunity to rectify a request before rejecting it due to technical details. In South Africa, the Gatherings Act regulates public gatherings and demonstrations at certain places, and provides that gatherings may be prohibited by the executive or that conditions may be imposed by them.[92] The Regulations Relating to Emergency Care at Mass Gathering Events[93] (hereinafter referred to as the Regulations) are applicable in South Africa when an organiser plans to hold a gathering involving the attendance of more than a 1000 participants,[94] or when less than 1000 participants are expected,

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88 *Poliakov v Belarus* para [3.1].
89 *Poliakov v Belarus* para [3.3].
90 *Poliakov v Belarus* para [8.3].
91 *Poliakov v Belarus* para [8.3].
92 See discussion of the Gatherings Act, Chapter 4 below.
93 Enacted in terms of section 90 of the National Health Act 61 of 2003, published in *GG* 40919 dated 15 June 2017, *GN* 566.
94 Regulation 2(1).

but it is considered a high-risk event.[95] In these circumstances, the Regulations require the organiser to arrange a risk assessment, and to arrange for adequate health and medical services. The organiser is liable for the cost of the emergency medical services.[96] The decisions of the HR Committee are therefore an important standard to weigh the conduct of the executive against.

In *Kovalenko v Belarus*, Kovalenko and about thirty inhabitants of Vitebsk, who had relatives who died in the Stalinist camps, attended a memorial service.[97] When the bus transporting the participants stopped in the parking lot, and the participants started taking out wreaths, flowers and a cross, police officers demanded that the memorial be stopped as it constituted an unauthorised mass event or picket.[98] The participants were detained and later prosecuted. The participants argued that the memorial in question was never intended to constitute any political, social or economic action, therefore, they had not sought prior authorisation, and, after all, the memorial did not affect the rights of others nor result in the damage to property.[99] The state argued that the event was conducted on a public road; that the participants used flags which do not constitute a state symbol;[100] and that authorisation for the gathering was not obtained.[101] The HR Committee was of the opinion that the state failed to show how the memorial violated the interests of the state,[102] and, therefore, found that the rights of the participants were violated.

The issue of prior authorisation for a demonstration form the focal point in *Bazarov v Belarus.*[103] In this case, Bazarov was arrested after he participated in a street march, and moved along a pavement down Lenin Street while carrying a flag. He was found guilty of partaking in an unauthorised mass action and fined 70,000 Belarusian roubles. He submitted that the event could not be considered mass action since only three persons were part of the event.[104] He explained that the event was spontaneous;

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95 Regulation 2(2).
96 See Chapter 4 below.
97 *Kovalenko v Belarus* para [1-2.1]
98 *Kovalenko v Belarus* para [2.2].
99 *Kovalenko v Belarus* para [3.2].
100 *Kovalenko v Belarus* para [4.2].
101 *Kovalenko v Belarus* para [4.3]. See section 2 of the Law on Mass Events.
102 *Kovalenko v Belarus* para [8.8].
103 *Bazarov v Belarus* (Communication no 1934/2010; CCPR/C/111/D/1934/2010 29 August 2014) para [2.1] (hereinafter *Bazarov v Belarus*).
104 *Bazarov v Belarus* para [2.4].

therefore, there was no need to notify the authorities. He only participated for ten minutes before he was arrested by the police.[105] The HR Committee was of the opinion that the state failed to explain why it was necessary to receive prior authorisation when only three persons intended to participate.[106] Furthermore, the HR Committee found it difficult to understand how walking along a pavement with a flag could violate the rights and freedoms of others, or pose a threat to public safety or order. The Committee suggested that it is more constructive for the executive to allow peaceful gatherings to continue than to take a restrictive approach by arresting participants.[107] Consequently, states must be careful to fully assess a situation before restricting the rights of anyone. When people gather peacefully, the state must be cautious to interfere, since any hindrance without being able to show that the gathering affected the rights of others or the interest of the state, will be seen as a violation of the right to freedom of assembly.[108]

If a government refuses to authorise proposed gatherings, the refusal may constitute a restriction on the right of peaceful assembly. In *Kirsanov v Belarus*,[109] Kirsanov applied for authorisation in order to hold a stationary demonstration to draw attention to the state's attempt to dismantle the Belarus Communist Party. The state denied authorisation; the reason being that the demonstration was planned by a political party. The HR Committee concluded that the right to peaceful assembly also includes the preparation and participation of the organiser and the organisation. The refusal to allow an assembly on the basis of the political contents constitutes serious interference with the right to gather. As stated by the Committee, when a state:

> …imposes restrictions to balance an individual's right and the general interest, it must facilitate the right, rather than introducing unnecessary or disproportionate limitations.[110]

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105 *Bazarov v Belarus* para [2.6].
106 *Bazarov v Belarus* para [7.5].
107 *Bazarov v Belarus* para [7.5].
108 In South Africa, participants in peaceful gatherings run the risk of being arrested under the Trespassing Act 6 of 1959 if they gather on private or municipal property. See Chapter 6.
109 *Kirsanov v Belarus* (Communication no 1864/2009 CCPR/C/110/D/1864/2009 12 May 2014).
110 *Kirsanov v Belarus* paras [2.1-9.7]. See also *Turchenyak and Others v Belarus* para [7.4].

In another application for authorisation to gather, that of *Chebotareva v Russian Federation,*[111] Chebotareva requested permission to hold a picket at the town square. However, the city's administration suggested an alternative location for the event. Chebotareva responded that the suggested location would not serve the purpose of the picket, and re-submitted a request to hold the picket in a different location. The city administration once again suggested another location. The HR Committee found that the state's restriction was unnecessary, and their refusal was a mere pretext to reject the request, thus, the right guaranteed in article 21 was violated.

Also, in *Turchenyak and Others v Belarus*, Turchenyak filed an application with the city executive requesting permission to hold a three-day picket.[112] The picket details involved ten people to gather for two hours at a pedestrian zone. The application was denied, since Decision No. 1715 of the Brest City Executive Committee approved a sport stadium as the only location for mass public events. The HR Committee remarked that a state must justify why a right needs to be limited.[113] A request may not be rejected on the sole reason that one location was previously approved for public events, since organisers may choose a location for a picket or gathering within sight and sound of a target audience. The state also failed to justify why authorisation was required to hold a meeting in a private place rented by a political party in *Lozenko v Belarus*.[114] The meeting was interrupted by the police, who entered the room, detained 28 people, and charged them with participating in an unauthorised public event.[115]

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111 *Chebotareva v Russian Federation* (Communication no 1866/2009 CCPR/C/101/D/1866/2009 26 March 2012) Summary 1.

112 *Turchenyak and Others v Belarus* para [1].

113 *Turchenyak and Others v Belarus* para [1]. See *Kuznetsov v Belarus* (Communication no 1976/2010CCPR/C/111/D/1976/2010 24 July 2014) Summary 1-2. The complainants held a picket and held up posters of the former Interior Minister for 30 minutes (he had disappeared ten years earlier) to point out the delay in the investigation into his disappearance. The Central District Court of Gomel found the complainants guilty of committing an administrative offence, and imposed a fine of 350 000 Belarusian roubles. Since the state had not provided any justification for the restrictions, the HR Committee was of the view that the state had violated the rights of the complainants under art 21. In *Youbko v Belarus* (Communication no 1903/2009 CCPR/C/110/D/1903/2009 7 April 2014) para [9.5], the Committee noted that: "if the state introduce a system aimed at reconciling an individual's freedom to impart information and to participate in a peaceful assembly and the general interest of maintaining public order in a certain area, the system must not operate in a way that is incompatible with the object and purpose of the Covenant".

114 *Lozenko v Belarus* (Communication no 1929/2010 CCPR/C/112/D/1987/2010 24 October 2014) Case Digest Summary (hereinafter *Lozenko v Belarus*).

115 *Lozenko v Belarus* 3.

The above cases provide illustrations of what the HR Committee has recognised as amounting to unjustified restrictions on the right to peaceful assembly under article 21 of the ICCPR. Therefore, states must be careful to restrict the rights of organisers or participants of peaceful gatherings in the following situations:

- Banning the organisation of a peaceful assembly merely on the grounds that a meeting on a similar subject had already been organised.[116]
- Rejecting the right to organise a gathering on the basis of its political content.[117]
- Withholding approval if the announcement about the venue, timing, subject matter and organisers of a meeting is published in a newspaper before authorisation is obtained.
- Arresting people who attend a memorial, when the event was never intended to constitute political, social or economic protest action.
- Withholding authorisation for a demonstration when the aim is to attract public attention to the state's policy against opposition political parties.[118]
- Creating considerable obstacles for organisers of public events.[119]
- Allowing public gatherings to be organised in only one specific location, far from the target audience.
- Arresting a group of people merely for walking on a pavement while holding photographs and posters, in order to attract public attention regarding a specific topic.[120]
- Withholding authorisation because the application is incomplete or not accompanied by receipts that provide confirmation of payment for services relating to the protection of public order and security, medical facilities and cleaning after the meeting.
- Arresting people who attend a meeting held in a private space rented by a political party.

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116 *Geisha v Belarus* (Communication no 1790/2008 CCPR/C/105/D/1790/2008 14 September 2012) para [6.1].

117 *Alekseev v the Russian Federation* (Communication no 1873/2009 25 October 2013) para [9.6]. The purpose of the gathering was to express concern regarding the execution of homosexuals and minors in Iran, and to call for a ban on such executions.

118 *Kirsanov v Belarus* (Communication no 1864/2009 CCPR/C/110/D/1864/2009 12 May 2014) paras [2.1]- [9.7].

119 *Poliakov v Belarus* para [3.3].

120 *Kuznetsov v Belarus* (Communication no 1976/2010CCPR/C/111/D/1976/2010 24 July 2014) 1-2.

The approach of the HR Committee in safeguarding the right to peaceful assembly under article 21 of the ICCPR is important since the South African Constitution already guarantees a similar right in the Bill of Rights.[121] These decisions are relevant when South African courts apply national legislation, and when the state utilises the discretion to arrest or prosecute participants for offences that stem from the right to gather. Just as the rights and freedoms set out in article 21 of the ICCPR are not absolute, and may be subject to restrictions in certain situations,[122] the Constitution of South Africa also provides that the human rights protected in the Constitution may be restricted. When a state imposes any procedure for organising a gathering, it effectively establishes restrictions on the right to freedom of assembly, and the state needs to demonstrate why such restrictions are necessary.[123] When a right is violated, the state is obliged to provide an effective remedy.

The lessons learned from the HR Committee cases are applicable in the South African context. It is important that the right of peaceful assembly is not restricted unnecessarily by decisions of the executive authorities. Organisers and participants of gatherings must be allowed as far as possible to organise and participate in peaceful meetings, especially if it is not hampering any interest of the state. Police officials must be properly trained, and their intention must always be on the facilitation of a peaceful gathering, rather than to disperse it.

2.4.2 Guidelines under the African Charter

The African Charter is binding on African states that acknowledge the importance of human rights, and have ratified the Charter.[124] The member states of the Organisation of African Unity (OAU) must recognise the rights and duties protected in the Charter, and must adopt legislation to give effect thereto.[125] The enforcement of the rights in the Charter is entrusted to the African Commission of Human and People's Rights

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121 See Chapter 3 below.

122 *Govsha v Belarus* paras [9.3]-[9.4].

123 *Govsha v Belarus* para [9.4].

124 The African Charter has been ratified by 54 member states, including South Africa. South Africa has also ratified the AU's Peace and Security Protocol. This Protocol emphasises commitment of the AU in observing the human rights of all citizens, international humanitarian law, as well as the sanctity of human life, as enshrined in Art 4 of the AU Constitutive Act, and Art 4(c) of the Protocol Relating to the Establishment of the Peace and Security Council of the AU. See Ministry of Police http://www.policesecretariat.gov.za/downloads/policies/policing_public_protests_2013.pdf (Date of use: 29 October 2020).

125 Article 1. Part I: Rights and Duties, Chapter I: Human and Peoples' Rights.

(ACHPR). The Charter provides for human and peoples' rights. Violation of any provision of the African Charter is considered a violation of article 1.[126] Article 2 provides that "everyone is entitled to the enjoyment of the rights and freedoms, without any distinction, for example to race, sex, language, religion or status." The enjoyment of all the rights in the Charter must be exercised with regard to the rights of others, and for their security, morality and common interest.[127]

The ACHPR must promote and protect human rights and interpret the Charter.[128] A member state may, by written communication, draw the attention of a state to a matter, if there are good reasons to believe that another member state violated the provisions of the Charter.[129] When a conclusion cannot be reached, the matter must be submitted to the ACHPR.[130] Individuals may also bring a complaint to the ACHPR alleging that a state, who is party to the Charter, has violated his or her right.[131] A complaint may be brought on behalf of others.[132] The ACHPR may only consider a communication when the seven requirements in Article 56 are adhered to.[133] The ACHPR, for example, will not deal with cases before all local remedies have been exhausted, unless it is obvious that these remedies would be unduly prolonged.[134] To assist with the duties, the ACHPR must draw inspiration, *inter alia*, from international law on

126 *Gunme and Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) 181.
127 Article 27(2) of the African Charter.
128 Evans and Murray *The African Charter on Human and Peoples' Rights* 10.
129 Article 47 of the African Charter.
130 Article 48-49 of the African Charter.
131 Article 55-56 of the African Charter.
132 African Commission on Human and Peoples' Rights https://www.achpr.org/public/Document/file/English/achpr_infosheet_communications_eng.pdf (Date of use: 22 July 2020).
133 These requirements are: 1. Indicate their authors even if the latter request anonymity. 2. Are compatible with the Charter of the AU, or with the present Charter. 3. Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the AU. 4. Are not based exclusively on news discriminated through the mass media. 5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. 6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter. 7. Do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the AU or the provisions of the present Charter. See also *Luke Munyandu Tembani and Benjamin John Freeth (represented by Norman Tjombe) v Angola and Thirteen Others* (Communication no 409/12), where the ACHPR discuss the seven requirements for admissibility.
134 According to art 50 of the African Charter, if a complainant does not have the means to use the local remedies available, this requirement will fall away; see Evans and Murray *The African Charter on Human and Peoples' Rights* 123. In *Nigeria: International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para [13-76], the ACHPR found that the ouster clauses render local remedies non-existent; see also *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000). In *Law Offices of Ghazi Suleiman/Sudan* (Communication no 228/99), the ACHPR held that Suleiman was constantly threatened, harassed and imprisoned; therefore, he could not have access to local remedies.

human rights, other African instruments on human and peoples' rights, the Charter of the UN, and the UDHR.[135]

Unfortunately, the resolution process is hindered by member states that fail to report back after receiving written communications, the slow process of examination of complaints, and the making of recommendations by the ACHPR.[136] Furthermore, the legal status of the ACHPR's findings and recommendations is unclear, since there is no clear mechanism to hold member states accountable.[137]

The African Charter also established the African Court on Human and Peoples' Rights (AfCHPR) to safeguard the protection of human and peoples' rights. The court's mission is to complement and reinforce the purpose of the ACHPR.[138] However, few African states recognise the competence of the court to receive cases, thereby seriously hampering the court in performing its mandate.[139]

2.4.2.1 The right to assemble freely under the African Charter

The African Charter protects the rights to assemble freely in article 11, and the right to free association in article 10. Both are fundamental rights that are inextricably interlinked with each other and with other rights.[140] For the purpose of this chapter, article 11 is relevant. Article 11 of the Charter provides that:

> Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.[141]

Anyone can freely gather with others. The right to assemble is not absolute, and can be restricted by member states if it is necessary in the interest of national security, the safety, health, ethics and rights and freedoms of others. The African Charter has a general application; therefore, member states may decide how the right is facilitated. The African Charter takes due regard of the UN Charter and the UDHR. South Africa,

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135 Article 60 of the African Charter.
136 Article 60 of the African Charter.
137 Okoloise 2018 *AHRLJ* 27.
138 The Protocol on the African Court on Human and Peoples' Rights (AfCHPR) https://www.african-court.org/en/ (Date of use: 22 July 2020) was adopted in 1998 and entered into force on 25 January 2004.
139 Enabulele 2016 *AHRLJ* 2.
140 ACHPR *Guidelines on freedom of association and assembly in Africa* 6.
141 African Charter art 11.

being a member state of the African Union, has a duty to bring national and domestic law in compliance with the rights and freedoms guaranteed in these instruments.

2.4.2.2 Guidelines on freedom of association and assembly in the African Charter

Article 45 of the African Charter mandates the ACHPR to formulate principles and rules to solve legal problems relating to human and peoples' rights and fundamental freedoms. These rules have been adopted by the ACHPR in the *Guidelines on freedom of association and assembly in Africa.* The aim of these guidelines is to assist member states and relevant role players in developing human-rights standards,[142] and to strengthen the obligations as set forth in the African Charter.[143] The *Guidelines on freedom of association and assembly in Africa* must, however, not be seen as static but evolving in the course of time as new challenges emerge.[144] The *Guidelines on freedom of association and assembly in Africa* are intended to serve as a basis for drafting laws that are compatible with the human rights protected in the African Charter.[145]

The guidelines provide, *inter alia*, that nobody may be compelled to participate in a gathering,[146] and that the right to gather only applies to peaceful gatherings. A gathering is seen as peaceful if the organisers have peaceful intentions, and the conduct at the gathering is generally peaceful. Isolated acts of violent conduct do not disqualify gatherings from being seen as peaceful, and conduct that annoys or hinders is still included under the understanding of the concept of 'peaceful'.[147] It is required that all the role players involved in gatherings be properly trained, and be made aware that the primary task is to facilitate peaceful gatherings.[148]

The guidelines affirm that it is a right to be able to gather; therefore, obtaining permission from the government is not a requirement. However, notification procedures may be put in place to facilitate the exercise of this right, and to protect the rights of others.[149] Notification procedures must, however, not be burdensome, and

142 ACHPR *Guidelines on freedom of association and assembly in Africa* 4.
143 ACHPR *Guidelines on freedom of association and assembly in Africa* 4.
144 ACHPR *Guidelines on freedom of association and assembly in Africa* 4.
145 ACHPR *Guidelines on freedom of association and assembly in Africa* 5.
146 ACHPR *Guidelines on freedom of association and assembly in Africa* para [68].
147 ACHPR *Guidelines on freedom of association and assembly in Africa* para [69].
148 ACHPR *Guidelines on freedom of association and assembly in Africa* para [78].
149 ACHPR *Guidelines on freedom of association and assembly in Africa* para [70].

failure to adhere to notification procedures must not render gatherings automatically illegal.[150] These notification periods must be as short as possible, only to allow the authorities time to prepare to facilitate the gathering. The notification process must be simple, involving the completion of a form, to be submitted online, free of charge.[151] It is imperative that the notification procedures need to be clear, transparent and easily readable.[152]

According to the *Guidelines on freedom of association and assembly in Africa*, everything possible needs to be done to facilitate different gatherings taking place simultaneously.[153] Gatherings with a small number of participants or spontaneous gatherings do not require notification.[154] One body must be responsible for receiving notifications, and for informing other relevant role players.[155] An independent oversight body must be available.[156] Gatherings must not be prohibited as part of a general ban but must be handled on a case-by-case basis.[157] Restrictions may only be imposed in accordance with the principle of legality; therefore, gatherings may not be restricted on broad or vague grounds.[158] The executive must attempt to facilitate gatherings at a place and within sight of its target audience,[159] and they must also protect gatherings from interference from third parties.[160] Conditions imposed by the government must be narrowly tailored and promote a substantial interest.[161] The prohibition of gatherings may only be used as a measure of last resort.[162] Any sanctions must apply in narrow and lawfully prescribed circumstances, and be proportional to the gravity of the conduct.[163]

As regards the responsibilities of the organisers or participants, these persons are not liable for costs of security and safety measures.[164] Organisers may not be held

150 ACHPR *Guidelines on freedom of association and assembly in Africa* para [71].
151 ACHPR *Guidelines on freedom of association and assembly in Africa* para [72].
152 ACHPR *Guidelines on freedom of association and assembly in Africa* para [77].
153 ACHPR *Guidelines on freedom of association and assembly in Africa* para [74].
154 ACHPR *Guidelines on freedom of association and assembly in Africa* para [75].
155 ACHPR *Guidelines on freedom of association and assembly in Africa* para [76]
156 ACHPR *Guidelines on freedom of association and assembly in Africa* para [79].
157 ACHPR *Guidelines on freedom of association and assembly in Africa* para [83].
158 ACHPR *Guidelines on freedom of association and assembly in Africa* para [85].
159 ACHPR *Guidelines on freedom of association and assembly in Africa* para [90].
160 ACHPR *Guidelines on freedom of association and assembly in Africa* para [94].
161 ACHPR *Guidelines on freedom of association and assembly in Africa* para [91].
162 ACHPR *Guidelines on freedom of association and assembly in Africa* para [92].
163 ACHPR *Guidelines on freedom of association and assembly in Africa* para [100].
164 ACHPR *Guidelines on freedom of association and assembly in Africa* para [96].

responsible if they fail to notify the government of a planned gathering or the public costs of such a gathering. However, organisers may be subject to monetary sanction when they failed to notify the executive of a planned gathering, and there is harm that was reasonably foreseeable caused during the gathering, and they failed to take reasonable steps within their power to prevent the harm. [165] When the right to gather has been infringed, organisers and participants must have a right to a remedy, which include compensation for harm that occurred. Members of the state who implement disproportional sanctions, disperse, or harass assemblies, must be held liable for violating the right to gather. [166]

The *Guidelines on freedom of association and assembly in Africa,* the *General comment* issued by the HR Committee,[167] and the *Guidelines on freedom of peaceful assembly*[168] are all in conformity. The *Guidelines on freedom of association and assembly in Africa* establish a standard against which all member states must measure their legislation in order to ensure the protection and fulfilment of human rights. The guidelines also serve as a training document for the police, prosecutors and judiciary when utilising their discretion with regard to offences stemming from the right to gather. Since it is assumed that the recommendations from the ACHPR are not binding, and that there is no clear mechanism of enforcement,[169] it is debatable whether the member states will adhere to these guidelines or choose selective implementation. For example, the guideline suggesting that organisers and participants can claim compensation for any harm that occurred when the state infringed the right to peaceful assembly will be met with cynicism by many states.[170] Also, the guideline that provides that the authorities must be held liable if they institute groundless or disproportionate sanctions or disperse or harass peaceful gatherings[171] will be difficult to implement when there is no independent oversight body. Organisers, again, will not want to be held responsible for a monetary sanction when they failed to notify the government of an intended gathering, and there was reasonably foreseeable harm caused by the gathering but they failed to take reasonable steps to prevent it.[172]

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165 ACHPR *Guidelines on freedom of association and assembly in Africa* para [102].
166 ACHPR *Guidelines on freedom of association and assembly in Africa* para [103].
167 See para 2.4.1 above.
168 See para 2.4.3.
169 See Enabulele 2016 *AHRLJ* 1-28; Okoloise 2018 *AHRLJ* 27-57.
170 ACHPR *Guidelines on freedom of association and assembly in Africa* para [103].
171 ACHPR *Guidelines on freedom of association and assembly in Africa* para [103(d)].
172 ACHPR *Guidelines on freedom of association and assembly in Africa* para [102].

On the other hand, the guideline providing that sanctions may only be applied in narrow and lawfully prescribed circumstances, and that they must be proportionate,[173] is especially valuable with regard to how the right to gather must be facilitated by the South African government.

On the whole, these guidelines are clear and easily understandable, and can assist to inform the general public what gathering conduct is deemed acceptable or not. South Africa, being a member state of the African Union, needs to recognise these rights, duties and freedoms as enshrined in the Charter, and needs to adopt legislation or give effect to the provisions of the Charter. The guidelines are an effective and instructive tool to revisit existing legislation, or to create new legislation in compliance with human-rights standards. It is therefore suggested that South Africa formally adopts the guidelines through legislation.

2.4.2.3 Case law on violations of the right to peaceful assembly

There are a number of cases dealing with the violation of the right to assemble freely with others in terms of article 11 of the African Charter.[174] In most of these instances, the right to assemble was unnecessarily restricted. For example, in some African states, it is required from organisers to obtain a permit before a gathering may be held. In *Inspector-General of Police v All Nigeria Peoples Party and Others,*[175] a request to issue police permits to hold rallies was refused. When a rally was held without a permit, it was violently disrupted by the police, since the Public Order Act[176] prohibits the holding of rallies or processions without a police permit.[177] Section 1(2) of the Act provides that the organiser must apply for a licence, 48 hours before the gathering.[178] The court considered whether a police permit is required for the holding of a rally,[179] and decided that the Public Order Act does not only impose restrictions on the right to

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173 ACHPR *Guidelines on freedom of association and assembly in Africa* para [100].

174 See footnote 141 above.

175 *Inspector-General of Police v All Nigeria Peoples Party and Others* (2007) AHRLR 179 (NgCA) (hereafter *All Nigeria Peoples Party*).

176 Public Order Act (Cap 382) Laws of the Federation of Nigeria 1990.

177 Public Order Act s 1(2).

178 Public Order Act s 1(2).

179 The judge in *All Nigeria Peoples Party* relied on the case of *New Patriotic Party v Inspector General of Police* 1992-93 GLR 585 (2000) 2 HRLRA 1 (hereinafter *New Patriotic Party*), where it was held that: "Police permit has outlived its usefulness, statutes requiring such permits for peaceful demonstrations, processions and rallies are things of the past. A police permit is the brain-child of the colonial era and ought not to remain in our statute books".

gather, it also leaves "an unregulated discretion on the whims of officials".[180] The court found that the requirement of a permit as a condition to hold meetings and rallies cannot be justified in a democratic society.[181]

In the case of *New Patriotic Party v Inspector-General of Police*,[182] the police granted a permit to hold a rally in Sekondi, Ghana. However, two days later, the permit was withdrawn and the rally prohibited. The complainant and other political parties embarked on a peaceful demonstration to protest against the retraction.[183] The police disrupted the demonstration, arrested the participants, and charged them with demonstrating without a permit.[184] The court held that when the Commissioner of Police prohibits a public meeting, he restricts the freedom to gather, furthermore, that once a permit was granted, there was no lawful authority for the police to withdraw it. The fact that other persons might disturb the meeting or procession, and thereby cause a breach of the peace is not a sufficient reason to withdraw a permit.[185] The court expressed concern that a senior police officer may, out of prejudice, bias or even political preference, refuse to issue a permit.[186] This decision holds a warning for South Africa. The Gatherings Act provides that an official from the municipality may prohibit a gathering or allow it to continue on certain conditions. Ironically, protests and marches may be aimed against the non-service delivery of the same dysfunctional municipality to whom notice must be given of the intended gathering.

In the case of *Lawyers for Human Rights v Swaziland,*[187] the Lawyers for Human Rights argued that during 1973, King Sobhuza II issued a proclamation[188] whereby he outlawed political parties, and, therefore, violated the Swazi people's right to freedom of assembly. The violations started in 1973 following the Proclamation by the King, prior to the coming into force of the African Charter, continued after Swaziland ratified the Charter, and is still on-going.[189] The question before the court was whether the

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180 *All Nigeria Peoples Party* para [5].
181 *All Nigeria Peoples Party* para [33].
182 *New Patriotic Party* 138.
183 *New Patriotic Party* para [1].
184 *New Patriotic Party* para [2].
185 *New Patriotic Party* para [2].
186 *New Patriotic Party* para [45].
187 *Lawyers for Human Rights v Swaziland* (2005) AHRLR 66 (ACHPR 2005) (hereinafter *Lawyers for Human Rights*). Swaziland is currently known as eSwatini.
188 The King's Proclamation to the Nation 12 of 1973.
189 *Lawyers for Human Rights* para [45].

ACHPR has the competence to entertain violations which occurred before the African Charter entered into force.[190] The ACHPR reached the decision that they may deal with the communication from the date the Charter was ratified by the state. The ACHPR established that Swaziland failed to take appropriate measures to bring their domestic laws in conformity with the African Charter, thus violating the rights protected in the Charter.[191]

In Malawi, the president gave a directive at a rally that there will be no demonstrations for or against the envisaged constitutional amendment dealing with the presidential term limit.[192] The directive was not reduced into writing. An application was brought to court arguing that the directive violates the rights to freedom of association, assembly and demonstration as guaranteed by the Constitution.[193] The court found the directive made by the president was unconstitutional, and found the banning of all forms of demonstrations unreasonable since the ban is too wide and not capable of enforcement.[194] The shouting of slogans and displaying of placards are part and parcel of rallies, and would be impossible to enforce. The directives would also nullify the rights enshrined in the Constitution.[195]

The case of *Law Offices of Ghazi Suleiman/Sudan*[196] is an example where the government of Sudan prevented a person from attending a gathering. Ghazi Suleiman was threatened with arrest if he made a trip to deliver a lecture. The court concluded that the prevention of the complainant to attend the gathering with others in order to discuss human rights, and then to punish him for doing so, violated his human rights to freedom of association and assembly, which are protected by Article 10 and 11 of the African Charter.[197] Also, in *Gunme & Others v Cameroon*,[198] the state suppressed demonstrations by using force in order to arrest and detain participants. The state admitted that demonstrators were detained, and that excessive force was applied to enforce law and order, for example, to disperse the demonstrations, and that lives

190 *Lawyers for Human Rights* para [44].
191 *Lawyers for Human Rights* para [44].
192 *Malawi Law Society and Others v President and Others* (2002) AHRLR 110 (MwHC 2002) para [3] (hereinafter *Malawi Law Society*).
193 *Malawi Law Society* para [4].
194 *Malawi Law Society* para [30].
195 *Malawi Law Society* para [8].
196 *Law Offices of Ghazi Suleiman/Sudan* (Communication no. 228/99).
197 *Law Offices of Ghazi Suleiman/Sudan* (Communication no. 228/99) para [56].
198 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009).

were lost because of such aggressive conduct. The ACHPR concluded that the conduct of the state violated article 11 of the African Charter.[199] Another violation occurred in *Amnesty International and Others v Sudan.*[200] In this case, the ACHPR found that the Process and Transitional Powers Act of 1989,[201] which prohibits any assembly for a political purpose in a public or private place when special permission was not obtained. Therefore, a general prohibition on the right to gather was seen as disproportionate to the measures required by the state to maintain public order, security and safety.[202]

The above case law provides illustrations of what the ACHPR and courts have recognised as amounting to unjustified restrictions on the right of peaceful assembly under article 11 of the African Charter. From these cases in point, it is possible to deduce that governments must be guarded when they restrict the right to gather in circumstances when:

- The discretion to allow a gathering is left to the unregulated discretion or whims of officials.
- The only reason not to allow the gathering was based on speculation of a possibility of violence and breach of the peace, or that other persons may disturb the meeting. Speculation whether a breach of peace will occur is untenable, and will deprive a citizen of the enjoyment of his or her right.[203]
- An official's decision not to grant a permit to hold a meeting cannot be challenged in court.
- An official – after granting a permit for a gathering – withdraws it, and prohibits the gathering in circumstances where there is no lawful authority to withdraw it.
- There is a requirement that a permit must be obtained to hold a gathering.
- Any gathering is prohibited for a political purpose in a public or private place.
- The establishment of political parties is prohibited.
- All forms of demonstrations are banned.

199 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para [136].
200 *Gunme & Others v Cameroon* (2000) AHRLR 297 (ACHPR 1999).
201 Process and Transitional Powers Act of 1989 s 7.
202 *Gunme & Others v Cameroon* (2000) AHRLR 297 (ACHPR 1999 para [82].
203 *Inspector-General of Police v All Nigeria Peoples Party and Others* (2007) AHRLR 179 (NgCA 2007) para [23].

- A person is prevented from gathering with others.

In the following section, the guidelines under the European human-rights system will be examined and evaluated against the guidelines under the African Charter and the Bill of Human Rights. The ultimate aim is to select the most functional guidelines for application in the South African criminal justice system.

2.4.3 Guidelines under the European human rights system

The ECHR was proclaimed by the governments of European countries aimed at protecting human rights and freedoms in Europe. Article 11 of the ECHR provides for the right to freedom of assembly and association and reads as follows:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.[204]

To ensure that the European governments which are contracting parties to the ECHR observe the rights, duties and freedoms in the Convention, the ECtHR was established.[205] The ECtHR can sit in a single-judge formation, in committees of three judges, in chambers of seven judges, or in a grand chamber of seventeen judges to consider cases.[206] Any contracting party can refer a breach of the provisions of the ECHR by another contracting party to the court.[207] The court may also receive applications from groups or individuals, claiming to be victims of a right violated by a contracting state.[208] However, the contracting party against which the complaint has been lodged must declare that it recognises the competence of the court to receive such applications.[209] The ECtHR may only deal with the matter after all domestic

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204 ECHR art 11.
205 ECHR art 19.
206 ECHR art 26.
207 ECHR art 24.
208 ECHR art 34.
209 ECHR art 25.

remedies have been exhausted.[210] Contracting parties are obliged to execute the final judgments of the court.[211]

2.4.3.1 Guidelines on freedom of peaceful assembly in the ECHR

As already stated in paragraph 2.1, the *Guidelines on freedom of peaceful assembly* was established by the Venice Commission and the OSCE ODIHR.[212] These guidelines are based on international and regional treaties, judgments of domestic courts, and on the general principles of law as recognised by the participating European countries.[213] The guidelines set out a clear minimum standard, thereby establishing a threshold that must be met by the governments when regulating the right to assemble peacefully.[214] The recommendations are valuable in assisting governments to facilitate gatherings, who must foremost recognise that the protection of the right to gather is crucial to create a "tolerant and pluralist society in which individuals and groups with different backgrounds and beliefs can interact peacefully with one another".[215] It is reiterated in the document that the state has a positive obligation to facilitate and protect peaceful gatherings.[216]

The *Guidelines on freedom of peaceful assembly* describes an assembly as "the intentional gathering of a number of individuals in a publicly accessible place for a common expressive purpose."[217] A public accessible place includes private spaces that are generally accessible to everyone.[218] Assemblies include organised,

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210 ECHR art 26. Protocol 14*bis*, that entered into force from October 2009, establishes a new admissibility criterion. However, the protocol only concerns states that have ratified it. The ECtHR may declare an application inadmissible if "the applicant has not suffered a significant disadvantaged". See European Court of Human Rights *The new admissibility criterion under Article 35§3(b) of the Convention* 9.

211 ECHR art 46.

212 See footnote 7 above.

213 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 11-12.

214 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 11-12.

215 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2019 para [1].

216 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [22].

217 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [12], [18].

218 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [12], [18].

unplanned, spontaneous, static and moving gatherings.[219] This collective further comprises online assemblies taking place on the internet that also warrant protection. Consequently, social media can be used as a tool to facilitate assemblies:[220]

> The European Convention on Human rights applies both offline and online. The role of the internet and social media in the mobilisation of assemblies is increasingly pivotal to the exercise of the right.[221]

The positive obligation of states to facilitate assemblies includes increased access to the internet.[222] Internet service providers have an obligation to respect, protect and host publicly available space for expression and assembly.[223] Notification is not required for online assemblies.[224]

The ECHR underscores the fact that all assemblies are protected if the organisers have peaceful intentions, and conduct at the assembly is non-violent.[225] However, any conduct that annoys, gives offence, or hinders is still included in the concept of what is deemed peaceful.[226] Therefore, only gatherings where there is convincing evidence that the organisers intend to use or incite imminent violence, are not protected.[227] Unlawful assemblies can be peaceful.[228] A peaceful participant does not stop enjoying the right to gather due to sporadic violence or any further punishable acts committed by others during the gathering.[229] The peaceful intentions of organisers are to be presumed, except when there is conclusive evidence that they intend to use or incite

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219 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [18].

220 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [20].

221 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [66].

222 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [67].

223 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [68].

224 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [117].

225 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [46].

226 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [19].

227 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [46].

228 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [48].

229 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [50].

imminent violence.[230]

As to the regulation or the giving of prior notification of assemblies, the *Guidelines on freedom of peaceful assembly* accentuates that the right to gather must as far as possible be enjoyed without any regulation.[231] Advance notification of an assembly is not a requirement under international human rights law, however, prior notification enables governments to ensure peaceful assemblies, and to facilitate the event.[232] In this regard, the public must have easy and practical access to relating procedure, law, regulations and police procedure with regard to assemblies.[233] Notification should not be required for assemblies in buildings.[234] Blanket legal restrictions, for example, the banning of all assemblies during certain times, or at certain locations or public places constitute excessive restrictions violating the right to freedom of assembly.[235] As regards penalties imposed for unlawful conduct committed in the context of gatherings, these must be:

> …necessary and proportionate, since unnecessary, or disproportionately harsh sanctions for behaviour during assemblies could inhibit the holding of such events and have a chilling effect that may prevent participants from attending. Such sanctions may constitute an indirect violation of the freedom of peaceful assembly. Offences such as the failure to provide advance notice of an assembly or the failure to comply with route, time and place restrictions imposed on an assembly should not be punishable with prison sentences, or heavy fines.[236]

The *Guidelines on freedom of peaceful assembly* comprises of practical experience that was gained by contacting parties of the ECHR dealing with assemblies over years. It is a living document that grows with changes in societies.[237] The guidelines take cognizance of problems experienced by governments when facilitating human rights. It is a reliable standard against which the conduct of participants and the executive

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230 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [46].

231 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [21].

232 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [25].

233 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [26].

234 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [116].

235 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [133].

236 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [36].

237 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [100].

must be measured. These guidelines can assist the South African government in facilitating the right to peaceful assembly, and to prevent violence. If the guidelines are introduced into the Gatherings Act,[238] it will solve various concerns, for example, the fact that organisers may be prosecuted when they fail to attend a meeting called by an official of the local authority.[239] The Gatherings Act provides for an intricate procedure of notification, and possible further conditions that can be imposed on proposed gatherings, or that the gatherings may be prohibited. The language of the Gatherings Act is also difficult to understand and unclear.[240]

2.4.3.2 Case law on unjustified restrictions of the right to peaceful assembly

Article 11 of the ECHR protects the right to assemble peacefully, but the right is not absolute. State authorities are given:

> …a margin of appreciation and may impose restrictions on the exercise of this right, provided that such limitations are prescribed by law; necessary in a democratic society; in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[241]

How the police react to a gathering may influence the decision to prosecute participants. In the case of *Kudrevičius and Others v Lithuania,*[242] farmers obtained permits to hold demonstrations at authorised locations. The farmers decided to move the demonstrations onto the highways without informing the authorities. The police allowed the demonstrations to continue, however, prosecution was subsequently instituted against the farmers. The farmers alleged that their conviction for rioting violated their rights to freedom of assembly and expression.[243] The government in return argued that there had not been any interference with the farmers' rights, since they had been given permission to organise peaceful meetings. Furthermore, the farmers had not been convicted for exercising their right to gather, but for a serious breach of public order by organising riots. The government submitted also that when the farmers moved onto the highways, parked tractors, and blocked three major roads,

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238 Gatherings Act 205 of 1993, see footnote 14 in Chapter 1.
239 Section 12(1)(b).
240 See Chapter 4 below.
241 Library of Congress https://www.loc.gov/law/help/peaceful-assembly/echr.php (Date of use: 10 October 2020).
242 *Kudrevičius and Others v Lithuania* (Application no. 37553/05*)* 15 October 2015 European Court of Human Rights (hereinafter *Kudrevičius and Others v Lithuania*).
243 *Kudrevičius and Others v Lithuania* paras [15]-[21].

they exceeded the scope of the permits.[244]

In the court's view, the serious disruption of the activities of others is not at the core of the freedom as protected by article 11 of the ECHR. The moving of the demonstrations was done without any prior notice to the authorities, and without asking them to amend the terms of the permits. Although the farmers contended that the roadblocks were their last resort to protect legitimate interests, the court was of the opinion that there was no reason to question the assessment of the domestic courts that the farmers had alternative and lawful means to protect their interests, such as bringing complaints before administrative courts. The court considered that even though the farmers had neither performed acts of violence nor incited others to engage in such acts, the almost complete obstruction of three major highways was done in blatant disregard of police orders and the rights of road users. The police showed a high level of tolerance, even when the farmers refused to obey their lawful orders, the police did not disperse the gatherings, but attempted to balance the interests of the farmers with that of the road users. Therefore, in the court's view, the domestic authorities did not violate the rights of the farmers by holding them criminally liable for their conduct. The court concluded that the Lithuanian authorities struck a fair balance between the legitimate aims of the "prevention of disorder [and the] protection of the rights and freedoms of others"[245] on the one hand, and the requirements of freedom of assembly on the other.

The case of *Frumkin v Russia*[246] is an illustration where the state's over-reach in attempting to facilitate a gathering resulted in a violation of the participants' rights. Notice of a public demonstration was submitted to the mayor of Moscow.[247] The march, with an estimated 5000 participants, was to be followed by a meeting. The aim of the demonstration was to demand fair elections and respect for human rights. The organisers were warned that they cannot exceed the number of 5000 participants as originally declared.[248] The police chief adopted a plan so as to safeguard public order; the plan provided for an 8094-strong crowd-control taskforce, comprising of the police and the military. The security plan set out the allocation and deployment of police vehicles, police buses, intercepting and monitoring vehicles, dog-handling teams, fire-

244 *Kudrevičius and Others v Lithuania* para [88].
245 *Kudrevičius and Others v Lithuania* paras [94]-[101].
246 *Frumkin v Russia* (Application no 74568/12 5 January 2016) (hereinafter *Frumkin v Russia*).
247 *Frumkin v Russia* para [7].
248 *Frumkin v Russia* para [12].

fighting and rescue equipment, ambulances, and a helicopter. An 1815-strong reserve unit equipped with gas masks, grenades, grenade launchers, rifles, tubeless pistols, and two water-cannon vehicles were ordered to be on standby. The march began at Kaluzhskaya Square, and was peaceful without any disruptions. The official estimate was that there were 8000 participants. When the march approached Bolotnaya Square, the leaders found that the layout of the meeting and the placement of the police cordon make it impossible for them to access the park at Bolotnaya Square.[249] After about fifteen minutes of attempting to engage with the police, the leaders announced that they were going on a 'sit-down strike', and sat on the ground. The crowd around the sit-down protest increased, which caused congestion. This prompted the leaders to abandon the protest, and head towards the stage, followed by the crowd. Some of the participants broke the police cordon, and the police cordon began to push the crowd into the restricted area.[250] In total, 656 people were detained in Moscow to prevent public disorder and unauthorised demonstrations.

The applicant, Frumkin, was arrested during the dispersal. He was found guilty of the failure to obey lawful police orders, and was sentenced to fifteen days' administrative detention. The applicant alleged a violation of his rights to peaceful assembly, freedom of expression and liberty. He argued that he had been prevented from taking part in an authorised public assembly because of the heavy-handed crowd-control measures used by the police. He pointed out that the restrictions as detailed in the police security plan were not aimed at ensuring the peaceful conduct of the assembly, but at limiting and suppressing it, and that the authorities had altered the original meeting layout without informing the organisers or the public. As tension surged, the authorities failed to communicate with the organisers, and failed to facilitate peaceful co-operation.[251]

The question before the court was whether the authorities took all reasonable measures to ensure that the meeting was conducted peacefully. The court criticised the police for not providing a reliable channel of communication with the organisers before the gathering, and for failing to respond to the real-time developments in a constructive manner. No official took any interest in talking to the leaders who were showing signs of distress in front of the police cordon. The court found that the

249 *Frumkin v Russia* para [28].
250 *Frumkin v Russia* para [35].
251 *Frumkin v Russia* paras [90]-[93].

authorities made insufficient efforts to communicate with the organisers to resolve tension caused by the confusion about the venue layout. The police neglected to take simple and obvious steps at the first signs of conflict. The court found that the applicant's behaviour remained strictly peaceful. It followed that any measures taken against him had to comply with the law, pursued a legitimate aim, and must be necessary in a democratic society. In this context, the severity of the measures applied against the applicant was entirely devoid of any justification. The court held, therefore, that the measures taken against the appellant were grossly disproportionate to the aim pursued. There was no 'pressing social need' to arrest the applicant, and to escort him to the police station. Article 11 of the ECHR was breached by the applicant's arrest, pre-trial detention and administrative penalty.[252] This case is significant, since the facilitation process utilised by the police can guarantee peacefulness, or render the gathering violent. In South Africa, similar situations often arise. If the ECHR principles were introduced into this jurisdiction, people accused of public violence committed during a gathering in South Africa might successfully argue that the gathering was peaceful until the police interfered, or that the facilitation process utilised by the police was the cause of the violence.

A further case in point where participants were arrested and detained by the police in the interest of public safety, and in order to prevent crime, is *Schwabe and MG v Germany*.[253] In this case, the applicants wanted to participate in demonstrations against the G8 summit in Heiligendamm. When the police sought to check their identity, the first applicant physically resisted by allegedly hitting the arms of a policeman, and kicking another – consequently, the applicants were arrested and detained for six days.[254] The applicants argued that their detention disproportionately interfered with their rights as it made it not impossible for them to participate and express their views during the summit.[255] The government alleged that the interference with the applicants' freedoms had been justified.[256]

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252 *Frumkin v Russia* paras [94]-[142].

253 *Schwabe and MG v Germany* (Applications no's 8080/08 and 8577/08 1 December 2011) (hereinafter *Schwabe and MG v Germany*).

254 *Schwabe and MG v Germany* paras [11]-[12].

255 *Schwabe and MG v Germany* para [90].

256 *Schwabe and MG v Germany* para [97].

The court found that there was nothing to indicate that the organisers of the demonstrations had violent intentions. Neither could such a conclusion be drawn from the fact that one of the applicants resisted the police. The nature and severity of the sanction imposed are factors to be considered when assessing the proportionality of interference in relation to the aim pursued. The court must determine whether the reasons adduced by the authorities to justify the interference were relevant and sufficient. The court noted that the applicants were detained for almost six days in order to prevent them from inciting others. The court accepted that guaranteeing the security of the participants in the summit and maintaining public order in general was a considerable challenge for the domestic authorities. However, a fair balance needs to be struck between the aim of securing public safety and the applicants' rights. The court was not convinced that there were not any more effective and less intrusive measures available.[257]

Petropavlovskis v Latvia[258] is a further case in point that the right to gather carries with it duties and responsibilities, which are subject to specified conditions, restrictions or penalties as prescribed by a state's domestic laws. The applicant complained *inter alia* under articles 10[259] and 11 of the ECHR that the refusal of Latvian citizenship through naturalisation was a punitive measure imposed on him because of his criticism of the government during gatherings.[260] The court stated that "pluralism, tolerance and broadmindedness are hallmarks of a democratic society",[261] therefore, a balance must be achieved between ensuring fair treatment of minorities. Nevertheless, the freedoms guaranteed by articles 10 and 11 cannot deprive the authorities of the right to protect its institutions. Hence, in order to guarantee the stability and effectiveness of a democratic system, the state may be required to take specific measures to protect it. The court agreed with the applicant that, in exercising his freedom of expression and assembly, he is free to disagree with government policies for as long as it takes place in accordance with the law, since the limits of permissible criticism are wider with regard to the government. However, the requirement of loyalty to the state cannot be considered as a punitive measure capable of interfering with the freedom of

257 *Schwabe and MG v Germany* paras [112]-[119].
258 *Petropavlovskis v Latvia* (Application no 44230/06 13 January 2015) (hereinafter *Petropavlovskis v Latvia*).
259 ECHR art 10 declares that: "Everyone has the right to freedom of expression".
260 *Petropavlovskis v Latvia* para [3].
261 *Petropavlovskis v Latvia* para [70].

assembly.[262]

From the above-mentioned ECHR case law, it can be deduced that it is essential that governments be careful not to restrict the right to gather in situations when:

- The executive does not provide a reliable channel of communication with the organisers before the gathering.
- The authorities fail to respond to real-time developments in a constructive manner.
- The authorities do not comply with their positive obligation to ensure the peaceful conduct of the gathering, to prevent disorder and to secure the safety of all the people involved.
- There is no 'pressing social need' to arrest and detain a participant.

As a result, it is crucial that police receive adequate training to be able to facilitate gatherings correctly. The government of the day must select the means and measures to guarantee the safety of the participants of gatherings, and the public in general. Communication with the organisers and participants, before, during, and after the gatherings is essential, since communication can diffuse potential violent situations. The executive must be careful not to instigate violence and confusion when attempting to facilitate gatherings. The police regularly arrest participants to diffuse a situation or to detain a risk, without considering that some or most of the participants' behaviour remained peaceful.

2.5 Conclusion

Offences that stem from the right to gather, as well as that of freedom of speech, differ from other offences in South Africa due to the magnitude of applicable international, regional and foreign case law and guidelines. The Constitution provides that courts must consider international law and may consider foreign law. Guidelines created by human-rights instruments are valuable since these strategies provide a standard or general framework for governments on how the right to gather may be regulated in practice at local and national level. These guidelines are not static but evolving in order

262 *Petropavlovskis v Latvia* para [55]-[87].

to regulate novel ways of gathering, for example, online assemblies.

Gatherings – both peaceful and violent – are a constant factor in South African life, yet the jurisdiction does not have a wealth of decisions on the right to assemble. Available international guidelines can assist in this regard. For example, the *Guidelines on freedom of peaceful assembly* has determined the meaning of the term 'peaceful' to include any conduct that hinders, impedes, or obstructs the activities of the general public, for example, by interfering with the flow of traffic. The extent of what peaceful conduct entails play a role in the decision-making of a police official, whether a gathering need to be dispersed or not. In this regard, it needs to be considered that some or most of the participants' behaviour may remain peaceful. According to the international and regional guidelines, a peaceful gathering must – as far as possible – be enjoyed without regulation.

The South African criminal justice system must keep track of new developments with regard to the right to gather, since international law is ever changing. The government needs to ensure that the public has access to reliable information about the procedures in order to arrange gatherings. Legislation with regard to the regulation of gatherings must also be easily assessable and understandable to a member of the public. It is submitted that information on gatherings, whether domestically or internationally, may be difficult to access by the public or even police officials. Some of the international standards may even be unfamiliar to the general South African community.

Facilitating participation in peaceful gatherings may prevent violence, ensure that fewer participants are arrested, and influence the judgments of courts. It is, therefore, important to recognise the instances where international or regional instruments already identified circumstances where the right to assembly was restricted by a government. It is debatable whether proper court decisions can be made without adhering to these guidelines. When deciding to arrest, prosecute, defend or adjudicate, it is important that the police, prosecutor, legal adviser and presiding officer are well versed in their domestic laws, as well as in the application of international and regional instruments. As such, the following chapter will investigate the right to assemble, demonstrate, picket or petition as provided for in the Constitution.

CHAPTER THREE

THE RIGHT TO ASSEMBLY, DEMONSTRATION, PICKET AND PETITION

3.1 Introduction

Congregating together occurs naturally during most human actions without any legal intrusion. This may happen physically in person or in an online gathering space. Most countries protect the right to assemble peacefully, to demonstrate, to picket or to present petitions in their constitutions.[1] Several types of assembling activities are protected, including:

> …planned and organised assemblies, unplanned and spontaneous assemblies, static assemblies (such as public meetings, 'flash mobs', sit-ins and pickets) and moving assemblies (including parades, processions, and convoys).[2]

For the purpose of this chapter, this right as provided in section 17 of the Constitution[3] is referred to as the right to gather. Assemblies, demonstrations, pickets and petitioning are included in the term 'gathering', if not specified otherwise.

Although the meaning of the right to gather is basically similar in most constitutions (as well as in relevant international and regional instruments),[4] it is the government of the day that decides how this right is utilised by citizens. Most constitutions not only provide for the right to assemble, but also indicate when this right may be limited. This chapter focuses on how the Constitution of South Africa guarantees the right to gather,

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1 E.g., art 40 of the Constitution of the Federal Republic of Nigeria, 1999 provides that "every person shall be entitled to assemble freely". Nigeria is a federal republic based on the principles of democracy and social justice. Art 58 of the Constitution of Zimbabwe, 2013 provides that "every person has the right to freedom of assembly and association, and the right not to assemble or associate with others". Art 59 provides that "every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully". Zimbabwe is a unitary, democratic and sovereign republic. Art 21 of the Constitution of Japan, 1946 provides that "freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed". According to Art 1 of the Constitution, the Emperor is the symbol of the state and of the unity of the people, deriving his position from the will of the people. Art 67 of the Constitution of the Democratic People's Republic of Korea, 1972 provides that "citizens are guaranteed freedom of speech, the press, assembly, demonstration and association". According to Art 1, the Democratic People's Republic of Korea is an independent socialist state that represents the interests of all the Korean people. See also para 1.1 above.

2 European Commission for Democracy through Law 2019 *Guidelines on freedom of peaceful assembly* para [44].

3 See discussion in para 3.2 below.

4 See discussion in Chapter 2 above.

but also permits for limitations in accordance with section 36.[5] National laws and by-laws promulgated by local governments likewise support the right to gather, but may also limit the right to the extent allowed by the Constitution. Legislation such as the Gatherings Act[6] was enacted to aid the Constitution by regulating the holding of public gatherings and demonstrations, therefore assisting citizens to organise protest action. The right is however easily limited, for example, by arresting or prosecuting organisers or participants of gatherings.[7]

How the courts deal with the question of whether or not the limitation is reasonable and justifiable in an open and democratic society, is explored in this chapter by considering applicable case law. Reference is also made to the guidelines from international and regional instruments as discussed in chapter 2 above. It will be made evident in this chapter that clear and well-drafted legislation can support the right to gather, assist to inform the public on how to utilise their rights, and what the consequences of certain gathering conduct will be.[8] The following paragraphs will examine firstly, the particular right as protected in the Constitution, new forms of assemblies and the regulation thereof, limitations on the right to assemble, and lastly, the positive obligation of the state to protect all forms of peaceful assemblies.

3.2 The right to gather protected

Section 17 of the Constitution guarantees "everyone the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions".[9] Anyone can bring a cause or problem under the attention of the government, but it must be done peacefully and unarmed. Everyone includes a natural or juristic person.[10] Most constitutions guarantee the right of assembly to anyone in their jurisdiction.[11] Some

5 See footnote 125 below.
6 The offences under the Gatherings Act are discussed in Chapter 4 below, but provisions of this Act are referred to in this chapter since the Act is responsible for limiting the right to gather.
7 See Sampson 2010 *AHRLJ* 433-434; Malherbe and Van Eck 2009 *TSAR* 209.
8 See Calland and Masuku 2000 *Law, Democracy & Development* 121-135.
9 Constitution s 17.
10 Section 8 of the Constitution.
11 According to the European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [109], the right of peaceful assembly is also extended to stateless persons, refugees, foreign nationals, asylum seekers, migrants and tourists.

constitutions, such as the Belgian Constitution, 1831 grants this right to citizens only;[12] however, other legislation can accord this protection to foreigners as well.[13]

The South African Constitution calls for two requirements in order to receive protection for the right to gather: the assembly, demonstration, picket or presentation of the petitions must, firstly, be peaceful and secondly, the gathering must be unarmed. These requirements will consequently be discussed.

3.2.1. The gathering must be peaceful

Assemblies, demonstrations, pickets and the presentation of petitions are excluded from protection by the Constitution if they are not peaceful. There is no clear indication in the Constitution of what exactly 'peaceful' entails. According to the ordinary meaning, the word 'peaceful' means: "free from disturbance, calm … not involving war or violence … inclined to avoid conflict".[14] Peaceful stands in contrast with violence, as violence entails the "use of physical force that is likely to result in injury or death or serious damage to property".[15] The *Guidelines on freedom of peaceful assembly,* applicable under the ECHR and to most European countries, provides that:

> Only peaceful assemblies fall within the scope of Article 11(1) ECHR and Article 21 of the ICCPR. The European Court of Human Rights has stated that the concept of a peaceful assembly does not cover gatherings where the organisers and participants have violent intentions or incite violence. The peaceful intentions of organisers and participants in an assembly are to be presumed, unless there is convincing evidence that they themselves intend to use or incite imminent violence.[16] The term 'peaceful' should be interpreted to include conduct that may annoy or give offence to individuals or groups opposed to the ideas or claims that the assembly is seeking to promote. This may even include, for example, assemblies advocating for changes to a country's territorial boundaries or to fundamental constitutional provisions so long as this is done in a non-violent manner.[17] An assembly can be 'peaceful' even if it is 'unlawful' under domestic law. In this regard, it is especially important to emphasize that the concept of 'peaceful' may include conduct that temporarily hinders, impedes or obstructs the activities

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12 Accordingly, art 26 of the Belgian Constitution provides that Belgians "have the right to assemble peacefully and without arms, in accordance with the laws that can regulate the exercise of the right, without submitting it to prior authorisation. This provision does not apply to open air meetings, which are subject to police regulations".

13 The Belgian Constitution art 191 directs that "all foreigners on Belgian soil should benefit from the protection provided to persons and property, except if limited by law".

14 Pearsall (ed) *Concise Oxford English Dictionary* "peaceful".

15 ICCPR *General Comment* para [15].

16 ICCPR *General Comment* para [46]. The ACHPR *Guidelines on freedom of association and assembly in Africa* [para 71] confirms this position.

17 ICCPR *General Comment* para [47].

> of third parties, for example by temporarily blocking traffic.[18]

There are no reasons why South African courts cannot take cognisance of these guidelines. The decision whether a gathering is peaceful or not, cannot be interpreted in a restricted manner. Violent acts by a few participants do not automatically denote that an assembly is violent.[19] Assemblies that involve purely passive resistance should be considered peaceful.[20] A participant who remains peaceful does not cease to enjoy the right to peaceful assembly as a result of sporadic violence committed by others.[21] Thus, conduct that constitutes 'violence' should be narrowly interpreted; however, this conduct can "extend beyond physical violence to include inhuman or degrading treatment or intimidation or harassment":[22]

> In practice, a gathering will be considered non-peaceful if the public and private interests (the public order, persons and property) are violated or threatened by violent or riotous action to such an extent that the limitation of the right, by prohibiting that particular action, would in any case have been justified in terms of section 36.[23]

The facts and circumstances of each case or situation are indicators of whether or not the gathering or handing over of a petition is considered to be peaceful. It is important that the police understand that a few bad apples do not render a gathering violent, and therefore unlawful. What the police considers to be 'peaceful' has a direct impact on how they facilitate gatherings.

3.2.2 The gathering must be unarmed

In South Africa, an assembly, demonstration, picket and presenting a petition are all excluded from protection of the Constitution when the participants are armed. It is debatable if a gathering of heavily armed men can be considered to be peaceful.

In South Africa, the Gatherings Act qualifies this requirement in the Constitution by providing that:

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18 ICCPR *General Comment* para [48].

19 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [50].

20 ICCPR *General Comment* para [86].

21 ICCPR *General Comment* para [50].

22 ICCPR *General Comment* para [51]. See also the European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [27]; Currie and De Waal *The Bill of Rights handbook* 384.

23 Omar 2017 *SA Crime Quarterly* 24. See also Rautenbach *Bill of Rights compendium* 1A-154.

> No participant may have at the gathering or demonstration in his or her possession any airgun, firearm, imitation firearm or any muzzle loading firearm, or any object which resembles a firearm and that is likely to be mistaken for a firearm; or any dangerous weapon, as defined in the Dangerous Weapons Act.[24]

The Dangerous Weapons Act 205 of 1993 defines a dangerous weapon as "any object, other than a firearm that is capable of causing death or inflicting serious bodily harm, if it was used for an unlawful purpose".[25] Therefore, depending on the circumstances, bottles, sticks, pangas, stones, and any sharp objects can qualify as a dangerous weapon. Participants in possession of such objects may thus be considered to be armed. However, objects that are not normally considered to be weapons must be permitted, unless there is a clear indication that it will be used to commit violence.[26]

3.2.3 Activities protected by section 17 of the Constitution

The South African Constitution protects specifically the activities of assemblies, demonstrations, pickets and petitions. Most constitutions and international instruments provide only for the protection of assemblies which can be seen as a collective term for demonstrations, pickets and petitions, and any other activity when people come together. However, what is understood under these activities or terms differ from country to country. The distinction in South Africa between these activities are somewhat blurred. The differentiation between demonstrations and gatherings as detailed in the Gatherings Act contributes to this confusion since the understanding of what a demonstration entails falls into the definition of a gathering which again encompasses an assembly.[27] However, all these activities are furnished with the same protection by the Constitution, but they must be peaceful and unarmed. An explanation of each activity follows below.

3.2.3.1 Assemblies

As stated above, the interpretation of the term 'assembly' differs from one country to another. Constitutions may protect the right to assemble, but what the act entails is

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24 Gatherings Act s 8(4).
25 Dangerous Weapons Act 205 of 1993 s 1.
26 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [154].
27 Gatherings Act s 1.

usually disclosed in other legislation sanctioning or limiting the conduct of participants at gatherings. For example, in Russia, the federal law[28] provides that assemblies imply the coming together of citizens at a place for the purpose to collectively discuss some socially important issues, while a meeting implies a mass gathering of citizens to publicly express a public opinion.

Following the Russian example above, it is expected that the South African Constitution's application with regard to the term 'assembly' should include any static and moving conduct of coming-together. According to the ordinary meaning, an assembly is "a group of people gathered together in one place for a common purpose … a group having legislative or decision making powers".[29] The Gatherings Act defines a gathering as "any assembly, concourse or procession of more than 15 persons in or on any public road, as defined in the Road Traffic Act ... or any other public place or premises wholly or partly open to the air."[30] In *re Munhumeso,*[31] the court mentioned that:

> …a procession, which is but an assembly in motion, is by its very nature a highly effective means of communication, and one not provided by other media. It stimulates public attention and discussion of the opinion expressed. The public is brought in direct contact with those expressing the opinion.[32]

The above-mentioned explanations create some confusion with regard to the activities that can be classified as an assembly. An assembly is one of the activities falling into the definition of a gathering under the Gatherings Act, while a procession is seen as an assembly in motion (as in the excerpt above).

International and regional guidelines give direction with regard to what assemblies entail. The *Guidelines on freedom of peaceful assembly* specifies that *'*assembly' constitutes a number of persons intentionally gathering together in order to jointly express themselves, in a space that is publicly accessible to all.[33] This description does not indicate that a specific number of participants or a specific purpose is required – people only need to gather for a common, expressive purpose. The gatherings may

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28 Federal Law No. 54-Fz of June 19, 2004 on Rallies, Meetings, Demonstrations, Marches and Picketing, passed by the State Duma on 4 June 2004 as endorsed, amended and ratified.

29 Pearsall (ed) *Concise Oxford English Dictionary* "assembly".

30 National Road Traffic Act 93 of 1996 s 1. For the full definition, see footnote 25 in Chapter 4 below.

31 *Re Munhumeso* 1995 (1) SA 551 (ZS) 1995 (1) SA 551 (ZS) 557.

32 *Re Munhumeso* 1995 (1) SA 551 (ZS) 1995 (1) SA 551 (ZS) 557.

33 See footnotes 216, 217 in Chapter 2; European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [12].

take place on public or privately-owned premises as long as the space is generally accessible to everyone.[34] The *Guidelines on freedom of association and assembly in Africa* further provides that an:

> Assembly refers to an act of intentionally gathering, in private or in public, for an expressive purpose and for an extended duration. The right to assembly may be exercised in a number of ways, including through demonstrations, protests, meetings, processions, rallies, sit-ins, and funerals, through the use of online platforms, or in any other way people choose.[35]

Therefore, peaceful assemblies may include demonstrations, meetings, processions, strikes, rallies, sit-ins and flash-mobs, candlelit vigils, pickets and marches.[36] It seems that the term 'assembly' includes all types of gatherings. The internet can be utilised for online assemblies, and social media can also assist to facilitate assemblies.[37] It must be remembered that although an assembly requires more than one participant, an individual person who exercises this right must be afforded the same protection as participants who gather together.[38] There is no reason why a person who is alone and protesting peacefully will not be able to utilise this right. The Constitution guarantees this right to everyone who wants to convey a message or cause to the attention of the government or someone else, in a peaceful and unarmed way.

It is suggested that all activities in South Africa that include the intentional and temporary presence of individuals in a public or private place, that are generally accessible to the public and ensue for an expressive purpose, must be embraced under the term 'assembly'.

3.2.3.2 Demonstrations

As stated above, the Constitution of South Africa protects peaceful and unarmed demonstrations. The ordinary meaning for the word 'demonstrate' includes; "when people take part in a march or a meeting to show their opposition to something or their support for it."[39] The Constitution guarantees the right to demonstrate in general, and

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34 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [12].
35 ACHPR *Guidelines on freedom of association and assembly in Africa* para [3].
36 ICCPR *General Comment* para [6].
37 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [20]; ICCPR *General Comment* para [34].
38 OSCE/ODIHR *Handbook on monitoring freedom of peaceful assembly* 11.
39 Pearsall (ed) *Concise Oxford English Dictionary* "demonstrate".

it does not specify the number of participants required to be classified as a demonstration, or if a demonstration needs to be politically motivated, or take place in a public or private space. The Gatherings Act defines a demonstration as follows:

> …any demonstration by one or more persons, but not more than 15 persons, for or against any person, cause, action or failure to take action.[40]

The Gatherings Act also differentiates between gatherings and demonstrations.[41] In the instance of a demonstration, the organiser of a demonstration is not required to provide notification to the government if fifteen people or less will be demonstrating. When more than fifteen persons gather, the government needs to be notified of the proposed gathering, and the activity is seen as a gathering. The definitions can possibly be perceived as a mechanism included in the Gatherings Act to limit the number of participants, since a small number of demonstrators may more easily be controlled. There is no indication that when the Constitution was enacted, the intention was that the number of participants in a demonstration be limited to fifteen people as provided in the Gatherings Act. It seems to be an artificial provision without any indication in the Gatherings Act as to how the maximum number of participants was agreed upon.

International and regional guidelines include demonstrations as an activity which falls under the meaning of an assembly.[42] It is suggested that a demonstration must be seen as the intentional and temporary presence of one or a number of individuals in a public or private place, accessible to the general public, in order to show their opposition or support for something. This definition easily fits into the suggested definition of what an assembly entails, namely activities that include the intentional and temporary presence of individuals in a public or private place accessible to the general public for an expressive purpose.

3.2.3.3 Pickets

The ordinary meaning of the term ‘picket’ includes “a person or group of people standing outside a workplace trying to persuade others not to enter during a strike”.[43]

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40 Gatherings Act s 1(v).

41 See footnote 30 above for the definition of a gathering.

42 ACHPR *Guidelines on freedom of association and assembly in Africa* para [3]; ICCPR *General Comment* para [6]; European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [18], [44].

43 Pearsall (ed) *Concise Oxford English Dictionary* “picket”.

A picket is normally associated with labour issues, and can be a form of social protest directed by one private party against another.[44] Section 23 of the Constitution provides for labour relations, and *inter alia* states that every worker has the right to join a trade union, engage in collective bargaining, and to strike.[45] There is a link between the right to picket, freedom of association,[46] and labour relation rights. Limitations on the right to freedom of association can impact negatively on the right to picket. In South Africa, the Labour Relations Act 66 of 1995 (LRA) facilitates the Constitution in realising this right, and in regulating the holding of pickets in the workplace. The Constitution stipulates a general protection to the right to picket. Sections 69(1), (2), (3) of the LRA again specify that:

> (1) a registered trade union may authorise a picket by its members for the purpose of peacefully demonstrating –
> (a) in support of any protected strike; or
> (b) or in opposition to any lock-out.
> (2) Despite any law regulating the right of assembly, a picket authorised terms of subsection (1), may be held –
> (a) in any place to which the public has access but outside the premises of an employer; or
> (b) with the permission of the employer, inside the employer's premises.
> (3) The permission referred to in subsection (2)(b) may not be unreasonably withheld.[47]

A picket in terms of the LRA implies that workers inform their employer beforehand that a picket is going to take place, since pickets usually transpire in a controlled environment, where the time, place and number of participants are known. A picket is thus a highly regulated form of protest in South Africa.[48]

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44 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* Chapter 43 25. See Chapter 6 below with regard to intimidation.

45 Section 23 of the Constitution: "1. Everyone has the right to fair labour practices. 2. Every worker has the right - a. to form and join a trade union; b. to participate in the activities and programmes of a trade union; and c. to strike".

46 Section 18 of the Constitution: "Everyone has the right to freedom of association".

47 According to the Department of Employment and Labour's strike monitoring report, workers in South Africa lost an estimated R266-million in wages in 2018 due to strike activities, 115 89 42 working days were further lost due to industrial disputes. See Department of Employment and Labour http://www.labour.gov.za/strikes-in-2018-reaches-a-high-in-the-past-five-year-%E2%80%93-department-of-employment-and-labour#:~:text=The%20IAR%20says%20there%20were,times%20more%20than%20in%202014 (Date of use: 12 February 2020).

48 During the Covid-19 pandemic, pickets could continue under level 3 of the Disaster Management Act 57 of 2002, since it is seen as part of the "work purposes" as in regulation 37 of the Disaster Management Regulations. However, strict guidelines as to how the picket must be conducted were prescribed, e.g., to adhere to social distancing, limiting the picketers, providing hand sanitizer, and to wear masks and covering the mouth and nose while faces remained visible. See *Swan Plastics CC and the National Union of Metalworkers of SA* (2020) 41 ILJ 2025 (CCMA).

The LRA outlines the right to picket by providing that it may be conducted in a place to which the public has access, although it usually occurs outside the premises of the employer. If the employer gives consent, the picket may be held (inside) the employer's premises; therefore, picketing may also take place on private property (which is accessible to the general public).

The South African government recently consented to regulations under the Labour Relations Amendment Act 10 of 2018,[49] which provide that a union may not embark on a picket unless there is a collective agreement with regard to a picket, or picketing rules were determined by the Commission for Conciliation, Mediation and Arbitration (CCMA)[50] in accordance with the default rules.[51] Default rules are applicable when the employer and the union fail to arrive at a picketing agreement.[52] If an agreement cannot be reached, the CCMA Commissioner, *inter alia*, may decide on the following: where the picket must be held – inside or outside the premises,[53] the date and duration of the picket,[54] the suspension of the picket, the chant of slogans, sing and dance, or the carrying of placards.[55] Only members of the union and employees of the employer may take part in the picket.[56] The LRA provides that the picketing agreement must be brought under the attention of the responsible officer (local authority) and authorised member (police member) as regulated in the Gatherings Act.[57] An organiser and marshals must be appointed, and properly informed about the rules. Interestingly, marshals need to wear armbands or vests to be identifiable,[58] and must be available from the start to the end of the picket.[59] Social media may be utilised to report changes in the identities of the marshals and organisers during the picket. Runciman[60] argues that these rules eliminate the pressure placed on the employer (who is typically the reason for the picket), as employers will have ample opportunity "to stockpile necessities, hire alternative labour and undertake other action to undermine the

49 Labour Relations Amendment Act 10 of 2018, established in terms of s 112 of the LRA.
50 Regulation 2 issued in terms of s 208 of the LRA.
51 Regulation 3 issued in terms of s 208 of the LRA.
52 Section 69(4) of the LRA.
53 Default rule 4 of the default picketing rules established in terms of section 69(5) of the LRA.
54 Default picketing rule 5.
55 Default picketing rule 6.
56 Default picketing rule 5.2.2.
57 See Chapter 4 below.
58 Default picketing rule 7.5.2.
59 Default picketing rules 7.5.3, 7.7.
60 Runciman https://theconversation.com/why-changes-to-picketing-rules-in-south-africa-pose-a-threat-to-strikes-104598 (Date of use: 22 February 2020).

collective power of workers".[61] Thereby, changing the way unions embark on protected strike action. When workers are violent, threatening or committing acts of intimidation or damaging property, it may result in forfeiture of the right to picket or to protest as part of the strike action.[62]

3.2.3.4 Petitions

The ordinary meaning of the word 'petition' includes "a formal written request, typically one signed by many people, appealing to authority in respect of a cause".[63] Although the right to petition can be seen as old-fashioned, it is frequently utilised nowadays.[64] For many citizens, it is the only way to bring their concerns to the attention of the government, as they lack funds or other methods of communication. Petitions are cheap – anybody can present one. It is a non-violent way of participating in protest action, and sometimes an effective way to highlight interests.[65] The use of a petition by communities is especially common with regard to gatherings held near courts. Communities employ this right to bring their cause under the attention of prosecutors or magistrates, and these petitions generally relate to a bail application or the sentencing of an offender. People who participate in a petition believe that they played a role in bringing their concern forward, as it is written down, signed and seen to be handed over to the person who needs to act thereupon.

Currently, there is no national legislation governing petitions. The National Assembly and the National Council of Provinces (NCOP) – one of the two houses of Parliament – are mandated to ensure that provincial interests are considered by the government. The NCOP may receive a petition from any interested person or institution in terms of section 17 of the Constitution. Some provinces in South Africa have adopted

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61 Runciman https://theconversation.com/why-changes-to-picketing-rules-in-south-africa-pose-a-threat-to-strikes-104598 (Date of use: 22 February 2020).

62 Runciman https://theconversation.com/why-changes-to-picketing-rules-in-south-africa-pose-a-threat-to-strikes-104598 (Date of use: 22 February 2020). See *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & Others* (2012) 33 *ILJ* 998 (LC) para [13]; *DisChem Pharmacies Ltd v Malema & Others* (2019) 40 ILJ 855 (LC).

63 Pearsall (ed) *Concise Oxford English Dictionary* "petition".

64 Corder and Du Plessis *Understanding South Africa's transitional Bill of Rights* 160.

65 Corder and Du Plessis *Understanding South Africa's transitional Bill of Rights* 160. See also Davis *South African Constitutional law* 239-242 where petitions are identified as a distinctly South African way of political participation.

legislation that sanctions the right to petition.[66] For example, the Gauteng Petitions Act 5 of 2002 provides for the right to submit a petition to the legislature of the province of Gauteng.[67] The Act describes a 'petition' as a "complaint or request or representation or submission that is addressed by a petitioner to the Committee," and a 'petitioner' as "the person who submits a petition".[68] Any person can submit a petition,[69] and it may be produced by a single person,[70] association,[71] collective,[72] mass or group,[73] and may concern the same, or substantially similar complaints or requests.[74] A petition may address any matter under the legislative or executive authority of the province.[75]

A petition can furthermore be developed with the aid of technology. In South Africa, provincial governments provide for a petition to be registered on their websites.[76] A simple Google search will provide a head office address of government departments or businesses, and a petition can be forwarded directly to available addresses online. Technology consequently facilitates or supports cyber-protests[77] or petitions. However, a petition does not have to be referred to the government, provincial authorities or businesses, it can also be handed over to a private entity, for example,

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66 See the KwaZulu-Natal Petitions Act 4 of 2003 (date of commencement: 31 August 2007), the North West Petitions Act 2 of 2010 (date of commencement: 30 May 2011), and the Northern Cape Petitions Act 8 of 2009 (date of commencement: 12 February 2010).

67 The Gauteng legislature convenes petition hearings to address concerns. The numbers of petitions have increased as a result of public education and awareness campaigns. This is a method used to attempt to decrease protests with regard to service delivery issues; see Gauteng Provincial Legislature Report 2013/2014 EPRE Vote 2 62. The Ekurhuleni Metropolitan Municipality Petitions By-Law, Council Resolution: A-Rc (12-2015) (date of commencement: 20 July 2016) addresses petitions to the municipality. Any person who is a resident of Ekurhuleni may submit a petition on any matter.

68 Gauteng Petitions Act 5 of 2002 s 1.

69 Gauteng Petitions Act 5 of 2002 s 2.

70 Gauteng Petitions Act 5 of 2002 s 4(1)*(a)*: "a single petition, which is an individual submission from a single petitioner, concerning a particular complaint or request."

71 Gauteng Petitions Act 5 of 2002 s 4(1)*(b)*: "an association submission, which is an individual submission from an association or single petitioner who has been mandated by an association to submit that petition, concerning a particular complaint or request."

72 Gauteng Petitions Act 5 of 2002 s 4(1)*(c)*: "a collective petition, which is a collection of signatures from a number of petitioners, concerning a particular complaint or request."

73 Gauteng Petitions Act 5 of 2002 s 4(1)*(d)*: "a mass or group petition, which is made up of individual or group submissions from a number of petitioners, concerning the same or substantially similar complaints or requests."

74 Gauteng Petitions Act 5 of 2002 s 4(1).

75 Gauteng Petitions Act 5 of 2002 s 4(3).

76 Gauteng provincial legislature http://gpl.gov.za/petitions-guide (Date of use: 20 February 2020); Gauteng provincial legislature https://www.pa.org.za/info/petitions (Date of use: 20 February 2020).

77 Mead *The new law of peaceful protest rights and regulations in the Human Rights Act era* 168; Bowers https://www.theguardian.com/money/2000/feb/10/workandcareers.uknews (Date of use: 20 February 2020); Buckingham 2000 *Stellenbosch LR* 133.

a church.

3.3 The evolution of gatherings

New challenges are arising as a result of novel methods of communication; for example, flash mobs without any identifiable causes, or cyber protest as an immediate response to any event around the world.[78] The digital age has brought advantages for the enjoyment of the rights to freedom of peaceful assembly. Social media diminishes the cost and timeframe of arranging protest action, since everybody is digitally connected.[79] Social media connects the poor, middle class, and the rich.[80] The internet provides an alternative space to gather although it can be difficult to control unlawful conduct, such as hate speech.[81] In South Africa, political activists rely heavily on social media when organising gatherings. The #FeesMustFall-movement is testimony to this – gatherings organised by students online began simultaneously at different education facilities throughout South Africa.[82]

When the Constitution was enacted, online gatherings was an unknown concept.[83] South Africa currently does not have any legislation providing for online protest. Although the Gatherings Act regulates the holding of public gatherings and demonstrations at certain places; it does not provide specifically for online gatherings or notification, mainly since it was enacted in 1996, when smart phones were unheard of, and access to the internet still a novelty. There is, however, no reason why gatherings or notification cannot take place online. When participants of gatherings commit offences online, they may possibly be dealt with under the Gatherings Act,[84] or under the Electronic Communications and Transactions Act 20 of 2000 which

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78 Brever *The role of social media in mobilizing political protest* 1. See also Rukundo 2017 *Stellenbosch LR* 508.

79 Brever *The role of social media in mobilizing political protest* 1; Rukundo 2017 *Stellenbosch LR* 508. See Reuters https://www.pressreader.com/south-africa/beeld/20181205/2818014000345 31 (Date of use: 2 November 2020) where social media is blamed for protest action in France. Facebook was used to convey messages by leaders to assist with arrangements.

80 Brever *The role of social media in mobilizing political protest* 1. 26.

81 Brever *The role of social media in mobilizing political protest* 1. 16.

82 See in this regard Karim and Kruyer 2017 *SA Crime Quarterly* 93, where the case of *Rhodes University v Student Representative Council of Rhodes University* is discussed. The authors argue that overly-broad interdicts obtained by universities to interdict the students' lawful protest action violated the constitutional right to assembly, and have a chilling effect on protests.

83 See para 3.2.3.1 above.

84 See Chapter 4 below.

sanctions unauthorised access, interception or interference with data, rendering data ineffective or overcoming security measures designed to protect data.[85] However, these Acts were enacted to address the character of the telecommunications environment or the digital problems experienced at a certain time period. Technological opportunities, the scope of these possibilities, and the utilisation of technology to one's own advantage will differ when the environment evolves.[86]

The government has published the Cybercrimes Act 19 of 2020[87] to provide for threats in cyber space; it forbids *inter alia* unlawful access, interception of data, interference with computer programmes, data storage, cyber forgery, and cyber extortion.[88] The Act outlaws the disclosure of a data message by means of electronic communication services when it is done with the intention to incite a person or group to cause damage to property or violence against a person or group.[89] Section 17 of the Act prohibits the attempt, conspiring, aiding, inducing, instructing, commanding or procuring of another person to commit offences. The Act also arranges *inter alia* that a court in the Republic has jurisdiction to try offences, when the accused is arrested in the territory of the Republic, or when the offence was committed outside the Republic against a citizen of the Republic.[90]

There are two main means in which cyberspace supports the right to gather online or online protest action. Firstly, social media serves as a tool to arrange gatherings and mobilise participants. It must be remembered that traditionally organisers also utilised telephones, telegrams, faxes or letters to mobilise participants. When the internet and smart phones became generally available, the speed of mobilisation and access to potential participants increased, since most persons in South Africa now have access to cellular phones.

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85 Section 86. The Bill also provides that a court in South Africa may trial the offence if the result of the offence had an effect in the Republic. Section 86 will be repealed when the Cybercrimes Act 19 of 2020 come into operation. Other offences that may be applicable to prosecute online are the Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002, the Protection of Personal Information Act 4 of 2013, and the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

86 *Amabhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Others* 2020 (1) SA 90 (GP).

87 The Act is not yet in operation; it is awaiting the President's assent.

88 Sections 2-10.

89 Sections 13-15. 'Violence' means bodily harm.

90 Section 24.

Secondly, the internet may be a vehicle or platform for gatherings, for example, online petitions to private or public entities, such as government departments or private businesses. People can gather online without being physically in the same country. The benefit of online protest or gatherings is that everyone gets the opportunity to state their views. Conduct during gatherings that may not be sanctioned include persons inciting violence or inciting others to commit offences, conduct rendering websites and services ineffective, or the flooding of e-mail accounts.[91]

International and regional guidelines provide specifically for the right to gather online.[92] Governments are obligated to respect and protect the rights of all individuals to gather peacefully – online as well as offline.[93] The government must utilise national legislation to support this right. Online gatherings and facilitation of gatherings increasingly rely on technology; therefore, governments must not unduly block or obstruct internet connectivity,[94] and should not:

> …silence, surveil and harass dissidents, political opposition, human rights defenders, activists and protesters, and to manipulate public opinion. Governments are ordering Internet shutdowns more frequently, as well as blocking websites and platforms ahead of critical democratic moments such as elections and protests. A surge in legislation and policies aimed at combating cybercrime has also opened the door to punishing and surveilling activists and protesters in many countries around the world. While the role that technology can play in promoting terrorism, inciting violence and manipulating elections is a genuine and serious global concern, such threats are often used as a pretext to push back against the new digital civil society.[95]

Governments must discharge their positive obligation to realise the right of freedom of peaceful assembly, by increasing access to the internet.[96] This responsibility includes providing free internet to all persons in public places and in remote areas.[97] Organisers must be able to choose the online environment as a space to gather.[98] Privately owned

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91 Van Niekerk 2017 *AJIC* 126. See also Van Laer and Van Aelst *Handbook of Internet Crime* 240-242.

92 See para 2.4 above.

93 UN Human Rights Council Resolution 21/16 (2012).

94 ICCPR *General Comment* para [34].

95 UN General Assembly Human Rights Council *Rights to freedom of peaceful assembly and of association* (Human Rights Council 17 May 2019 A/HRC/41/41) para [3].

96 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [67].

97 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [67].

98 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [68].

internet service providers, for example, Facebook, Twitter and YouTube need to host publicly available space for online gatherings, however, they can be held accountable when content that amounts to incitement to violence or hate speech are not removed.[99] The *Guidelines on the freedom of peaceful assembly* recommends that gatherings must as far as possible be allowed without any regulation, and this includes online protests or gatherings, as long as no offence is committed.[100]

It is thus evident that in order to ensure that the right to gather is enjoyed by everyone, legislation must keep up with modern technological developments. Legislation supporting the right to gather as guaranteed in the Constitution must allow for online protest action, and indicate which online conduct is regarded as unlawful, and cannot be tolerated. However, it must be considered that online gatherings may easily be abused for economic, commercial or political gain, and may not be a true reflection of pressing concerns,[101] for example, online trolls are compensated to disseminate propaganda, isolate or drown out critical views.[102]

3.4 Limitations on the right to assemble, to demonstrate, to picket and to present a petition

Section 36 of the Constitution allows for the limitation of rights.[103] The rights outlined in the Bill of Rights may only "be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society that is based on the values of human dignity, equality and freedom".[104]

South African courts have already dealt with the question whether provisions in the national legislation limit the right to gather as guaranteed by section 17 of the Constitution, and is, therefore, unconstitutional and invalid. Constitutional challenges

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99 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [69].

100 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [21], [45].

101 See Dingeldey 2019 *Law Democracy & Development* 181-201.

102 UN General Assembly Human Rights Council *Rights to freedom of peaceful assembly and of association* para [45].

103 See Popken https://www.nbcnews.com/tech/security/trolls-hire-russia-s-freelance-disinformation-firms-offer-propaganda-professional-n1060781 (Date of use: 2 November 2020).

104 See Meyerson 2004 *Acta Juridica* 138.

were consequently brought to the validity of certain sections of the Gatherings Act.[105]

In the *Mlungwana*-case,[106] an appeal that progressed from a criminal case, section 12(1)(a) of the Gatherings Act was challenged which provides that it constitutes an offence to convene a gathering in respect of which no notice was given.[107] In this case, fifteen people travelled from Khayelitsha to the Cape Town's Civic Centre, and chained themselves to the railings of the building.[108] In terms of the Gatherings Act, no notice is needed if fifteen people or less want to demonstrate. The protest was peaceful; however, when more people joined, the police requested that they leave. When they refused, they were arrested.[109] The applicants argued that the criminalisation of the failure to give notice or adequate notice is unconstitutional,[110] additionally, it discourages people from exercising their right to assemble peacefully and unarmed.[111] The court concluded that the sanction in section 12(1)(a) of the Gatherings Act constituted a limitation to the exercise of section 17 of the Constitution, since all the appellants obtained criminal convictions for failure to give notice of a gathering – an assembly where they were seeking a response on an on-going sanitation problem in Khayelitsha. In reality, the Act implicated that sixteen people are prohibited to convene a gathering in a public space, if the organiser did not notify the local authority.[112] The court found that section 12(1)(a) had a chilling effect on the right guaranteed in section 17, because of the well-known calamitous effects of a previous conviction.[113]

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105 See discussion of Els 2006 *TSAR* 537.

106 *Mlungwana and Others v S and Another* (A431/15) [2018] ZAWCHC 3 (24 January 2018) (hereinafter *Mlungwana* (WCC)). In *Mlungwana*, the Constitutional Court confirmed that the underlying reasoning in the judgment of the High Court was correct.

107 The police may allow a gathering to proceed on conditions they deem fit where no notice was given. According to the Goldstone Commission, if the activities of the demonstrators violate general criminal laws or occasion civil liability, particular demonstrators or those urging them on can be sanctioned later through the normal processes of the law, or through the disciplinary mechanisms of the organisation holding the demonstration. See Institute of Criminology *Crowd management: Civilian and police conduct* v. A panel of experts from South Africa, the United States, Canada, Great Britain, Belgium and the Netherlands agreed on the principles which framed the recommendations of the Goldstone Commission of Inquiry regarding the Prevention of Public Violence and Intimidation.

108 *Mlungwana* (WCC) para [11]; *Mlungwana* paras [29]-[30].

109 *Mlungwana* (WCC) para [11]; *Mlungwana* paras [29]-[30]. Also see Barrie 2019 *TSAR* 405.

110 *Mlungwana*-case (WCC) para [15]; *Mlungwana* para [4].

111 *Mlungwana*-case (WCC) para [16].

112 *Mlungwana* para [54].

113 *Mlungwana*-case (WCC) para [42].

In S *v Tsoaeli and Others,*[114] also a criminal case, the appellants appealed against their conviction of contravening section 12(1)(e) of the Gatherings Act. The appellants attended a gathering for which no prior notice had been given. They argued that since they had only attended the gathering and not organised it, they had no criminal liability.[115] The council for the appellants argued that their conviction for the "mere attendance of a gathering violated the principle of legality as expressed in the *maxim nullum crimen sine lege*"[116] was flawed, and must be set aside since it amounted to an infringement of the right to protest.[117] The court found that a provision which allows for unarmed and peaceful participants of protest action to risk losing their liberty and to acquire a criminal record, undermines the spirit of the Constitution.[118] The court was of the opinion that section 12(1)(e) of the Gatherings Act is not written in a language that clearly declares that a gathering for which no prior notice was given is automatically prohibited.[119]

In *SATAWU and Another v Garvas and Others*[120] – the first post-constitutional pronouncement on the right to freedom of assembly as enshrined in section 17 of the Constitution – the constitutionality of sections 11(1) and 11(2) of the Gatherings Act were challenged. These sections set out the liability for damage that arises from gatherings and demonstrations. Section 11 provides:

> (1) If any riot damage occurs as a result of –
> (a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;
> (b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.
> (2) It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves –
> (a) that he or it did not permit or connive at the act or omission which caused the damage in question; and

114 S *v Tsoaeli and Others* 2018 (1) SACR 42 (FB) (hereinafter *Tsoaeli*).
115 *Tsoaeli* 42.
116 *Tsoaeli* para [8].
117 *Tsoaeli* para [8].
118 *Tsoaeli* para [41].
119 *Tsoaeli* para [35].
120 *SATAWU* para [1]. This case was a civil matter.

(b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and
(c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.

In this case, the South African Transport and Allied Workers Union (SATAWU) organised a gathering which resulted in a riot and damage to property. The respondents proceeded against SATAWU for their damages under section 11(1). SATAWU denied liability, and argued that section 11(2)(b) was an unjustifiable limitation of the right to freedom of assembly.[121] The applicants firstly contended that the words "and was not reasonably foreseeable" in section 11(2) of the Act rendered the section irrational and inconsistent with the principle of legality, since it was impossible to prevent an unforeseeable act, and, secondly, that section 11(2) unjustifiably limited the right to freedom of assembly.[122] The court held that sections 11(1) and 11(2) deemed organisers of gatherings liable for riot damage on a wider basis than under the common law. Compliance with the requirements of section 11(2) significantly increased the costs of organising gatherings, therefore, it amounted to a limitation of the right protected in section 17 of the Constitution.[123]

In the above-mentioned cases, the court found that sections 11(1), 11(2), 12(1)(a), and 12(1)(e) of the Gatherings Act limited the right guaranteed in section 17 of the Constitution. In all three judgments, the court went further and considered whether the limitations were constitutionally justifiable with regard to the relevant factors prescribed by section 36 of the Constitution,[124] which include:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.[125]

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121 *SATAWU* para [84].
122 *SATAWU* para [26].
123 *SATAWU* paras [56]-[59].
124 Kroeze 2001 *Stellenbosch LR* 265.
125 Constitution s 36(1). According to s 36(2), except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights. See Petersen 2014 *SAJHR* 405 regarding the balancing of competing interests as part of the

After examining the nature and importance of the right to assembly as a relevant factor imparted in section 36, the courts in the *Mlungwana* and *SATAWU*-cases found that assemblies are central to the constitutional democracy of South Africa, and give a voice to the powerless. It was held that all gathering acts provide an outlet for the frustrations of the vulnerable groups without political and economic power, and are, in certain circumstances, the only mechanism available to express legitimate concerns. As such, assembling is one of the primary means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. The conduct has a foundational relevance to the exercise and achievement of all other rights,[126] and is an important mode in which the excluded and marginalised expressed themselves against the apartheid system, and are part and parcel of the participatory democracy they fought for.[127] The courts held that gatherings remain a vital tool to the country's democracy,[128] and may not be limited without good reason.[129]

As regards the importance of the purpose of the limitation, the court in the *Mlungwana-case* considered that section 12(1)(a) of the Gatherings Act serves a legitimate administrative purpose, since it facilitates the right protected in section 17 of the Constitution, and meets the prescripts of public welfare and social value.[130] The Gatherings Act only requires a notice for gatherings of sixteen and more participants, and provides for a defence with regard to spontaneous gatherings.[131] The purpose of the notification requirement is to ensure that proper planning and suitable preparations take place, for example, that a sufficient number of police officers are deployed.[132] If no notification is given, crucial issues such as the planning of routes and appointment of marshals cannot occur, and, therefore, the risk that the gathering is not peaceful increases.[133] The importance of the limitation is to protect the rights of everyone,[134] and the notice serves a legitimate purpose as every right must be exercised with due

proportionality test, which is often criticised because of the supposed lack of rational standards of comparison.

126 *SATAWU-case* para [61]; *Mlungwana* para [70].
127 *Mlungwana* (WCC) para [62]; *Mlungwana* para [61].
128 *Mlungwana* (WCC) para [47]; *Mlungwana* para [69].
129 *SATAWU* para [66].
130 *Mlungwana* (WCC) para [55].
131 See definition of a gathering in section 1 of the Gatherings Act.
132 *Mlungwana* (WCC) para [51].
133 *Mlungwana* (WCC) para [51].
134 *Mlungwana* (WCC) para [51].

regard to the rights of everyone.[135]

In the *SATAWU*-case, the court deliberated that the purpose of the limitation is to protect everyone, especially "those who do not have the resources or capability to identify and pursue the perpetrators of the riot damage for which they seek compensation".[136] The organisation may cancel a gathering when reasonably damage is foreseeable, but the victims of riot damage do not have any option with regard to what happens to them or their belongings.[137] The organisers must, therefore, reconcile themselves with the risk of a violation of the rights of innocent bystanders.[138] The purpose of section 11 is that organisations must accept the consequences of their actions, and that they will be held responsible for harm triggered by their decision to organise a gathering.[139]

Concerning the nature and extent of the limitation of the right, the *Mlungwana* court deemed that the effect of the sanction for the failure to give notice has a suppressing or chilling effect on the exercise of the right to gather.[140] The criminal sanction was judged to stifle free speech. The effect of the limitation is not only to punish the organisers for failing to notify; it also deters people to exercise their right to gather.[141] It comes with the loss of liberty and a previous conviction that impacts negatively on future employment, travel, or study prospects.[142] The definitions for a 'gathering' and the 'organisers' are broad, and expand the scope of criminal liability for contravening section 12(1)(a) of the Gatherings Act, accordingly peaceful gatherings without notice will be an offence because of how broadly a gathering is defined.[143] It can be seen as a legislative overreach, since no regard is given to the effect of the protest on the public order itself.[144] Where an organiser is not appointed, anyone who "has taken *any* part in planning or organising or making preparations for that gathering,"[145] however

135 *Mlungwana* (WCC) para [56].
136 *Mlungwana* (WCC) para [67].
137 *Mlungwana* (WCC) para [67].
138 *Mlungwana* (WCC) para [68].
139 *SATAWU* para [54].
140 *SATAWU* para [87]. See *Teddy Bear Clinic for Abused Children and Another v Minister of Justice & Constitutional Development and Another* 2014 (2) SA 168 (CC) para [87].
141 *Mlungwana* (WCC) [85]. See also *Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 487 (CC) para [40].
142 *Mlungwana* (WCC) para [81].
143 *Mlungwana* (WCC) para [83] - [84].
144 *Mlungwana* (WCC) para [85].
145 *Mlungwana* (WCC) para [86].

marginal, could be criminally liable. The limitation does not distinguish between adult and under-aged organisers; therefore, children can be liable if they fail to give notice before organising a gathering[146] – although children may not be held criminally liable on the same basis as adults, given their vulnerability and lack of self-restraint.[147]

The *SATAWU*-case confirmed that section 11 has a deterring effect on the right to gather, however, it was found that it merely subjects the exercise of the right to strict conditions, for example, the presumption of liability for riot damage, which can be traced to the decision of the organisation to proceed with a gathering when harm is foreseen.[148]

The last requirement as prescribed in section 36 of the Constitution concerns the balance between the limitation, the purpose and less restrictive means to achieve the purpose. As to this prescription, the court in *Mlungwana* reflected that the purpose of the Gatherings Act is to ensure that all people "have the protection of the state"[149] to exercise their right to protest – a right that cannot be restricted by a notice requirement. Therefore, the criminal sanction is disproportionate to the offence of merely failing to comply with the notice requirement, since a criminal conviction hampers almost every aspect of a person's life, and endures for ten years before it may be expunged.[150] Additionally, it is the previously disadvantaged that will be sanctioned by section 12(1)(a), and that less restrictive alternatives to section 12(1)(a) exists, *inter alia*, civil liability, administrative fines, or changing the definitions of a gathering and demonstration as delineated in the Gatherings Act.[151] The limitation is consequently not reasonable and justifiable in an open and democratic society, based on the values of freedom, dignity and equality,[152] as the nature of the limitation is too severe, and the nexus between the means adopted in section 12(1)(a) of the Gatherings Act and

146 *Mlungwana* (WCC) para [89].
147 *Mlungwana* (WCC) para [89].
148 *SATAWU* para [71].
149 *Mlungwana* (WCC) para [86].
150 *Mlungwana* (WCC) para [93].
151 *Mlungwana* (WCC) para [94]. See also *Federal-Mogul Aftermarket Southern Africa (Pty) Ltd v Competition Commission and Another* [2005] *CPLR* 50 (CAC) discussing the difference between fines in criminal matters and administrative matters; *Teddy Bear Clinic for Abused Children v Minister of Justice & Constitutional Development* 2014 (2) SA 168 (CC) para [95]; *S v Mamabolo (E TV Intervening)* 2001 (3) SA 409 (CC) para [49].
152 *Mlungwana* (WCC) para [95].

any legitimate purpose is too tenuous to render section 12(1)(a) constitutional.[153]

With reference to section 36(e) of the Constitution, the *SATAWU* court took into consideration the purpose of section 11, which is to ensure that a gathering does not become violent and destructive, and result in loss to others leaving its victims without recourse. Section 11 protects the rights of individuals who may be affected by riot damage that takes place during the exercise of the right to gather.[154] The purpose is to achieve a balance between the right to gather on the one hand, and the safety of people and property on the other.[155]

In the *Mlungwana*-case, the court declared that section 12(1)(a) of the Gatherings Act is unconstitutional.[156] In the *Tsoaeli*-case, the court found that section 12(1)(e) of the Gatherings Act does not create an offence for the participants of a gathering where no prior notice was given to the authorities.[157] The court concluded that it was not necessary to adjudicate on the appellants' application in respect of the constitutionality of section 12(1)(e) of the Act.[158] In the *SATAWU*-case, the court found that the limitation on the right to assemble is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[159]

It is clear from the courts' reasoning in the above-mentioned cases that the Gatherings Act in some instances fails to achieve the standard required by the Constitution, in regulating the holding of gatherings. The limitations the Act creates are not always reasonable and justifiable in an open and democratic society, based on the values of freedom, dignity and equality. A criminal conviction under the Gatherings Act has a disastrous impact, and is disproportional for merely utilising the right guaranteed under section 17 of the Constitution. The approach of the courts when dealing with cases where participants were prosecuted under the Gatherings Act raises a red flag with regard to the constitutionality of the other offences under the Act.[160] For example, organisers of gatherings can still be prosecuted if they fail to attend a meeting called by the local authority, or did not adhere to all their duties or a condition imposed by

153 *Mlungwana* (WCC) para [101].
154 *SATAWU* para [80].
155 *SATAWU* para [81].
156 *Mlungwana*-case (WCC) para [94]; *Mlungwana* para [112].
157 *SATAWU* para [42].
158 *SATAWU* para [44].
159 *SATAWU* para [84].
160 See Chapter 4 below.

the local authority.[161] These offences can deter people from exercising their right to gather. Although these and other provisions of the Gatherings Act were not thus far tested in court, it is foreseen that in most instances they will be declared unconstitutional.

3.4.1 Circumstances in which the right to assembly may be limited

Section 17 of the Constitution, which guarantees the right to assemble, to demonstrate, to picket and to hand over a petition, is not an absolute right. First of all, the facts of each case and applicable legislation play a role in how this right may be limited. Secondly, in South Africa, any limitation must be justified in terms of section 36 of the Constitution.[162] In the following sub-paragraphs, circumstances in which the right to gather may be limited as in the Gatherings Act will be discussed. Since South African courts must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent therewith,[163] reference is therefore also made to permissible grounds of restriction of this right under international instruments.

3.4.1.1 The interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others

International and regional instruments pronounce under which circumstances the right to peaceful assembly may be restricted.[164] Restrictions are only permissible in conformity with the law, and when necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Only restrictions that are permissible under international human rights law, for example, the ICCPR, ECHR and African Charter, are allowed.[165] These instruments confirm that governments may violate the right of freedom of assembly in times of war or public emergency,[166] but they may only do so if the crisis or emergency affects the whole population, and

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161 See section 12(1)(b)(c), (f) of the Gatherings Act.
162 See para 3.4 above.
163 Section 233 of the Constitution, see Chapter 2 footnote 28 above.
164 Guidelines from regional and international instruments, as well as case law, are discussed in Chapter 2 above, with regard to how the conduct of governments must be qualified.
165 See art 21 of the ICCPR, art 11 of the ECHR and art 11 of the African Charter.
166 See art 4 of the ICCPR and art 15 of the ECHR.

constitutes a threat to the organised life of the community.[167]

Gatherings will generally impact on the rights and freedoms of others; however, governments must balance the right to gather with the rights and freedoms of others.[168] The right to gather can be restricted in the public interest, for example, to prevent imminent violent conduct that may seriously infringe the public order,[169] or to prevent crime.[170] Restrictions based on moral grounds are rare, and in most circumstances, inappropriate.[171] Restrictions necessary in the interest of national security can only be imposed to protect a nation against violence,[172] or to protect the nation's "territorial integrity or political independence against a credible threat or use of force".[173] Restrictions based on public safety is more common; it is usually applicable when participants of gatherings create significant and imminent danger for others.[174]

During the Covid-19 pandemic, the rights of the public were limited due to public health concerns, and to protect the health of the whole nation. The Disaster Management Regulations[175] issued under the Disaster Management Act 57 of 2002, prohibit gatherings during levels 4 and 5. This prohibition was permissible under the Constitution which provides that a state of emergency may be declared in terms of an Act of parliament, when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster, other public emergency, and when such a declaration is necessary to restore peace and order.[176] However, this type of injunction

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167 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [92].

168 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [143].

169 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [139].

170 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [140].

171 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [142].

172 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [136]-[137].

173 ICCPR *General Comment* para [42].

174 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [138].

175 Published in *GG* 43107 dated 18 March 2020 as amended, *GN* 318, see regulation 1.

176 Constitution s 37. See, e.g., Proclamation no. 24 of 1999, Emergency Regulations applicable to the Caprivi Region made in terms of art 26 of the Namibian Constitution, in which an existence of a state of emergency has been declared under Proclamation no. 23 of 2 August 1999 – *GG* 2157 dated 3 August 1999.

will always infringe the rights of citizens.[177]

3.4.1.2 The contents or purpose of the gathering

The Constitution does not differentiate between cultural, social, political or religious assemblies, demonstrations, pickets or petitions, as such, the right is not only reserved for when the contents or purpose of the gathering is politically aimed. The Gatherings Act provides that "every person has the right to assemble with other persons and to express his views on any matter freely in public and enjoy the protection of the state while doing so".[178] The Act limits a demonstration to a maximum of fifteen persons who may protest for or against any individual, on any grounds, and for any act or omission to act.[179] The definition of a gathering provides for any "principles, policy, actions of any government, political party or political organisation",[180] but throws the field wide open for activists, petitioners, or persons mobilising or demonstrating backing for or in opposition to any "views, principles, policy, actions or omissions of any person or body of persons or institution".[181]

If the aim of a gathering involves pressuring or protesting against the government or any individual, the provisions of the Gatherings Act limits the right in the Constitution by requiring notification to the government before the gathering takes place. The government may impose certain conditions or prohibit the gathering to take place at a certain time or place, or ban the gathering altogether. Woolman[182] criticises the definition of a gathering as established in the Gatherings Act, and is of the opinion that the Act makes no attempt to distinguish between different kinds of gatherings (social, economic, spiritual or political), is subject to subjective or arbitrary interpretation, and accordingly impossible to read down to a constitutionally acceptable definition.[183] In

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177 See, e.g. the case of *Ex Parte Van Heerden* [2020] ZAMPMBHC 10 (27 March 2020) which was decided during the Level 5 lockdown period. In terms of the provisions of Regulation 11B(1)(a)(ii) of the final lockdown COVID-19 Regulations issued on 25 March 2020, Van Heerden was prohibited to travel from Mpumalanga to the Eastern Cape in order to bury his grandfather [para 10]. Although Roelofse AJ expressed extreme sympathy for the applicant [para 16], his application was dismissed [para 17].

178 Gatherings Act Preamble.

179 Gatherings Act s 1(v); see para 3.2.3.2 above, and para 4.3 below.

180 Gatherings Act s 1(vi)*(a)*; see footnote 28 in Chapter 4.

181 Gatherings Act s 1(vi)*(b)*.

182 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 43 23.

183 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 43 23. *See De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2003 (3) SA 389 (W), *Dawood & Another v Minister of Home Affairs & Others, Shalabi & Another v Minister of Home Affairs & Others, Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC).

contrast, the German[184] and Hungarian[185] Constitutions reserve the protection of the right of freedom of assembly to meetings aimed at political will,[186] excluding social, cultural or 'fun' gatherings.[187] The Russian Federation excludes election campaign meetings, religious rites and ceremonies from constitutional protection.[188]

The Gatherings Act restricts the right in the Constitution by prohibiting gatherings where the content or purpose is to incite hatred on account of differences in culture, race, sex, language or religion; whether the participants do that by displaying banners, placards, singing or verbalising, or in any other conceivable manner.[189] Persons present at or participating in a gathering or demonstration may also not perform any act or utter any words which are calculated to cause violence against any person or group of persons.[190] These provisions are in accordance with the values of the Constitution,[191] and the *Guidelines on freedom of peaceful assembly* which provides that:

> In principle, therefore, any restrictions on assemblies should not be based on the content of the message(s) that they seek to communicate … This also applies to assemblies expressing views that may 'offend, shock or disturb' the State or any sector of the population … Similar considerations apply with regard to imparting information or ideas contesting the established order or advocating for a peaceful change of the Constitution or legislation by non-violent means".[192] "Display of symbols such as flags, insignia, and other expressive items is protected communication that is entitled to the same freedom of speech and assembly protections as other forms of communication. Even where the insignia, uniforms, costumes, emblems, music, flags, signs or banners played or displayed during an assembly conjure memories of a painful historical past, this in general should not of itself be a reason to interfere with the right to freedom of peaceful assembly. In cases where the respective insignia or symbols are prohibited from being displayed by law, law enforcement should first attempt to confiscate the prohibited items, while letting the assembly proceed (provided it continues to remain peaceful). On the other hand, where this leads to violence, or where such symbols are intrinsically and exclusively associated with acts of physical violence or expressions of racism or other forms of fundamentalism, the assembly might legitimately be restricted to prevent the occurrence or reoccurrence of such violence, unlawful intimidation or

184 Constitution of the German Democratic Republic, 1949.
185 Constitution of Hungary, 2011.
186 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* 129.
187 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* 129.
188 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* 129.
189 Gatherings Act s 8(5). See also footnote 121 in Chapter 4 below.
190 Gatherings Act s 12(6).
191 Constitution s 1.
192 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [149].

other significant violations of valid criminal laws.[193]

The Gatherings Act also prohibits the wearing of apparel that resembles uniforms worn by members of the security force.[194] No person may at a gathering or demonstration wear any form of clothing that resembles any of the uniforms worn by members of the security forces, including the police and the South African Defence Force.[195] Where uniforms carry a message associated with acts of physical violence or hatred, the gathering can be disallowed.

The *Guidelines on freedom of association and assembly in Africa* determines that when matters of "public or political concern are addressed, which may include criticism of the state, the gathering must be given maximum protection by the state".[196] There have been instances where governments limit the right to freedom of assembly by imposing improper restrictions on the contents and purpose of gatherings, for example, in Algeria, the law bans all gatherings opposing the government.[197] Prohibition on the contents or purpose of the gathering must take place as a measure of last resort.

3.4.1.3 The number of participants

As previously stated, the Gatherings Act limits the constitutional right to gather by requiring notification to the government when more that fifteen persons want to assemble. In this regard, the Act distinguishes between demonstrations and gatherings, as no notice needs to be given for a demonstration.[198] Demonstrations differ from gatherings in terms of the size of the group.

Demonstration ← 15 persons	16 persons→ Gathering

One of the possible reasons why the Act differentiates between gatherings and demonstrations is that smaller groups do not pose the same threat and impact on the rights and freedoms of others, as larger groups. Smaller groups also do not require as

193 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [154].
194 Gatherings Act s 8(7).
195 Gatherings Act s 8(8).
196 ACHPR *Guidelines on freedom of association and assembly in Africa* paras [77]-[79].
197 Article 9 of the Law 89-28 of 1989 on Public Meetings and Demonstrations.
198 Section 1 of the Gatherings Act; also see para 3.2.3.2 and Chapter 4 for a further discussion.

much effort to monitor and control from the local authority and the police. On the other hand, a demonstration may start out small but may easily escalate into a massive gathering when onlookers join the demonstration in solidarity. An organiser can plan to hold a demonstration, but when people join in, the demonstration instantaneously becomes a gathering. This conduct may have an unsettling effect on an organiser attempting to arrange a demonstration. Although the notification procedure is still in operation, the court in the *Mlungwana*-case declared the sanctioning of the convening of a gathering where no prior notice was given, unconstitutional and invalid.[199] Although the definitions of a gathering and demonstration were not challenged by the appellants, it was alleged that the distinction between a gathering and demonstration is "arbitrary and irrational as it is unclear why 16 is an appropriate number to sanction gatherings".[200]

3.4.1.4 Private property

Section 17 of the Constitution does not distinguish between private or public property when guaranteeing the right to gather. Therefore, the protection of the Constitution is applicable to people coming together in both private and public places. States must consequently ensure that all assemblies, whether public and private, are protected from interference, harassment or intimidation.[201] However, owners of private property can prohibit the use of their property for people to assemble, demonstrate, picket or to present petitions.

As mentioned above in paragraph 3.4.1.3, the Gatherings Act requires that when sixteen or more people want to gather in a public place, notification of the intended gathering must be given to the government. The definition of a gathering provides for "… in or on any public road … or any other public place or premises wholly or partly open to the air." The Gatherings Act is thus not applicable to gatherings taking place on private property, and, therefore, no notification is needed. The LRA[202] stipulates that picketing may be held in any place to which the public have access, but outside the premises of an employer. After permission has been obtained from the employer, it may be held inside the employer's premises. A picket, therefore, can also take place

199 *Mlungwana*-case (WCC) para [101]; *Mlungwana* para [112]; see footnote 16 in Chapter 1 above.
200 *Mlungwana*-case (WCC) para [94].
201 ACHPR *Guidelines on freedom of association and assembly in Africa* para [94].
202 LRA s 69.

in an employer's premises which can be a private place depending on the circumstances. If the public generally have access to a premise, it is deemed to be a public place.

According to the *Guidelines on freedom of peaceful assembly*, the right to freedom of peaceful assembly is applicable to assemblies on both private property and publicly accessible places.[203] Prior notification is not required for meetings on private property. Similarly, the *Guidelines on freedom of association and assembly in Africa* provides that the right to freedom of assembly applies to meetings on private as well as public property.[204]

The question with regard to gatherings on private property is becoming imperative to take into account in South Africa, especially in respect to land invasion and the redistribution of land. People may gather peacefully on private land to bring their causes under the attention of the government, however, the gathering usually take place without the permission of the owner. The owner, whose interest is violated, in turn, may open a case of trespassing at the police.

3.4.1.5 Notice of gatherings

International instruments do not require any notification to the government, or permission or authorisation from the government to hold a gathering, but recognise that there may be legitimate reasons for requiring advance notification.[205] In most countries, the governments require notification for a gathering to occur. The minimum notification period differs from country to country. In England, it must be six clear days before the event;[206] in Germany, the notification period is at least 48 hours before the event.[207] In some countries, authorisation or consent is needed; in others, permission need to be obtained or a permit needs to be issued.[208]

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203 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [63].

204 ACHPR *Guidelines on freedom of peaceful association and assembly in Africa* para [69].

205 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [113].

206 Sections 11(4) and (5) Public Order Act 1986.

207 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [161].

208 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [330].

The Constitution of South Africa does not mention any notification, authorisation or permission for assemblies to take place. The Gatherings Act does, however, require notification to the authorities when more than fifteen persons are planning to convene a gathering, as explained above. In terms of section 3 of the Act, the organiser of a gathering must notify the local authority in writing. A time frame of at least seven days before the gathering is to be held, is prescribed.[209] If it is not possible to give earlier notice; then it needs to be done at the earliest opportunity,[210] but if notice is given less than 48 hours before the commencement of the gathering, the local authority may provide a notice to the organiser prohibiting the gathering. The Gatherings Act requires that local authorities convene a meeting with the organisers and other interested parties within 24 hours of receipt of the notification. Once the meeting takes place, the local authorities are given a significant degree of discretion in deciding whether or not to allow the gathering. If an agreement cannot be reached on the contents of the notice, the local authority can impose conditions with regard to the holding of the gathering.[211] Spontaneous assemblies are generally regarded as one of the exceptions to notification.

3.4.1.6 Procedure in prohibiting gatherings

Section 5 of the Gatherings Act deposits the discretion to prohibit a gathering in the hands of the responsible officer (an official appointed by the local authority).[212] When credible information under oath is brought to the attention of the official that there is a threat, and that the police and the traffic officers will not be able to contain this threat,

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209 This notice period creates doctrinal problems and practical difficulties. See Woolman, Bishop and Brickhill Constitutional *Law of South Africa* 43-9; 43-10. E.g., the experiences of the Thembelihle Crisis Committee (TCC). The TCC has adopted the practice of filing a notice – on a Friday – ten days in advance of an assembly scheduled for two Mondays hence. On Monday, the local authorities set up a meeting for Tuesday. On Thursday, the TCC conveners receive notice that their assembly has been prohibited. On Friday, the TCC files an urgent application in a Magistrate's Court to have the prohibition set aside. The Magistrate summarily dismisses the application, and rules as follows: *(a)* Rule 55(1) of the Magistrates' Court Rules requires that an application shall be delivered on 10 days' notice; *(b)* Rule 9 (14) states that this ten-day notice period may be reduced if an application shows 'good cause', and thereby satisfies the requirements for urgency; *(c)* since the applicants could not demonstrate the requisite risk to life or liberty, the application does meet the conditions for reduced notice; *(d)* no other remedy is contemplated in the rules; *(e)* the date of the proposed gathering possesses no particular significance; and*(f)* future applications must observe the Magistrates' Court Rules with respect to proper notice periods.

210 Gatherings Act s 3(2).

211 The conditions can include arrangements with regard to vehicular or pedestrian traffic, rush hour traffic, distances between two rival gatherings, access to property and workplaces, and prevention of injury to persons and property. See Gatherings Act s 4(4)(b).

212 See Chapter 4 below.

the official must consult with the organiser of the gathering, the police, and other role players.[213] If the official is, after the consultation, convinced that the threat cannot be contained, the proposed gathering may be prohibited.[214] Credible information will be based on available operational information (taking into account the level of the risk, discussions and arrangements with the organiser, history of peaceful or violent protests, past experience with the parties, and the suitability and vicinity of the venue, etc.).[215]

The right to gather will always be limited if a gathering is prohibited. In South Africa, it is in the power of only one person, employed by the local authority, to prohibit a gathering. His or her political perception may play a role in the decision-making. On the other hand, in England, when the chief officer of police reasonably believes that the powers under section 12 of the Public Order Act will not be sufficient to prevent a public processions resulting in serious public disorder, he or she must apply to the council of the district for an order prohibiting the public procession for a period not exceeding three months.[216] On reception of such an application, the council may, with the consent of the Secretary of State, make such an order.[217]

3.4.1.7 Organising the event

According to the *Guidelines on the freedom of peaceful assembly,* pre-event planning with the executive is important, especially with regard to large or controversial gatherings.[218] It is recommended that the organiser beforehand seeks the assistance of the police and relevant role players. Although the Gatherings Act does not provide that the organiser may request the assistance of the police, it is possible to do so. These discussions may comprise the deployment of police officials, marshals, venues, and specific concerns. The Regulations relating to Emergency Care at Mass Gathering Events[219] are applicable in South Africa if an organiser plans to hold a gathering

213 Gatherings Act s 5(5)(1).
214 Gatherings Act s 5(3).
215 See South African Police National Instructions 4 of 2014 para 9(2).
216 Public Order Act s 13(1).
217 Public Order Act s 13(2).
218 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [124].
219 Regulations relating to Emergency Care at Mass Gathering Events, enacted in terms of s 90 of the National Health Act 61 of 2003, published in *GG* 40919 dated 15 June 2017, *GN* 566 of 2017 (hereinafter Emergency Care at Mass Gathering Events).

involving the attendance of more than 1000 participants,[220] or when less than 1000 participants are expected, but the incident is considered a high-risk event.[221] In these circumstances, the regulations require from the organiser to arrange a risk assessment, and adequate health and medical services. The organiser must take the responsibility for the cost of providing health and medical services for the gathering.[222] Most organisations or communities do not have the finances, the know-how or administrative support to adhere to these regulations.

3.4.1.8 Time, place and sound restrictions

Legislation providing for time, place and sound restrictions seriously undermines the purpose of gatherings, and can be regarded as violations of the right protected in the Constitution. Time, place and sound restrictions are usually found in by-laws. For example, in Serbia, the freedom of assembly is guaranteed in locations designated by municipal or city regulations.[223] Ukraine, Serbia, the Russian Federation and Turkey place general time limits on the exercise of freedom of assembly, amounting to a night-time ban on gatherings.[224] The reason for the ban seems to be to prevent squatting on public property. In South Africa, by-laws in municipal areas, for example, the Parks and Open Spaces By-Law[225] provide that no person may deliver, utter or read aloud any public speech or address of any kind, or sing any song, or hold or take part in any public meeting or assemblage, except with the prior written consent of the Municipality.[226] Effectively the by-laws require written permission from the municipality. According to the *Guidelines on freedom of peaceful assembly*, everybody has an equal right to use public parks, squares, streets, roads, avenues, sidewalks, pavements and footpaths, therefore, the state should always seek to facilitate

220 Emergency Care at Mass Gathering Events Regulation 2(1).
221 Emergency Care at Mass Gathering Events Regulation 2(2).
222 Emergency Care at Mass Gathering Events Regulation 3(4).
223 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [501].
224 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [506].
225 Parks and Open Spaces By-Law, Provincial Gazette Extraordinary 2385 dated 11 November 2014, Local Authority Notice 2294.This by-law was created by the Council of Govan Mbeki Municipality in terms of s 156 of the Constitution read in conjunction with ss 11 and 98 of the Local Government: Municipal Systems Act 32 of 2000 as amended.
226 Parks and Open Spaces By-Law s 4.

gatherings in these locations.[227]

3.4.1.9 Anonymity of participants

In South Africa, the Gatherings Act provides that the notice to the local authority must at least contain the names, telephone and facsimile numbers of the organiser and his or her deputy, as well as the name of the organisation or branch on whose behalf the gathering is convened. It will consequently be problematic to notify the local authority about an intended gathering if the organiser chooses to stay anonymous. Similarly, it is not allowed for participants of gatherings to disguise themselves in order to remain unidentified. In terms of section 12(7) of the Gatherings Act, persons may not – at any gathering or demonstration – wear a disguise or mask, or any other apparel or item which obscures their facial features and prevent their identification. However, during the Covid-19 pandemic, the wearing of masks was compulsory in most countries, even during demonstration or gatherings. According to the *Guidelines on freedom of peaceful assembly*, the wearing of a mask for expressive purposes at a peaceful gathering must not be prohibited,[228] so long as it does not create a danger of imminent violence.[229] Conversely, some governments go to the extent of keeping databases of participants in gatherings, such as in England.[230] In Turkey, identification rights extend to the right to take fingerprints and photographs.[231] In South Africa, the police are not prohibited from taking photos or life coverage of gatherings and demonstrations. It will be difficult for participants of a gathering to raise an objection on the grounds of privacy, or that they want to stay anonymous.

3.4.1.10 Restricted zones or places

In South Africa, legislation prohibits gatherings or demonstrations at restricted places. These restrictions make serious inroads into the right guaranteed in section 17 of the Constitution. Section 7 of the Gatherings Act prohibits demonstrations and gatherings

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227 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [83].

228 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [153].

229 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [153].

230 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [508].

231 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [508].

in vicinity of courts, buildings of Parliament, and the Union Buildings. All demonstrations and gatherings in a court building or within a radius of 100 metres from such building, and an area specified in the City of Cape Town[232] and Pretoria[233] are prohibited. If a magistrate of the district, the Chief Magistrate of Cape Town, or the Director-General of the Office of the State President grant permission in writing, the gathering or demonstration may continue.[234]

The Control of Access to Public Premises and Vehicles Act 53 of 1985 provides for the safeguarding of certain public premises and vehicles, and for the protection of people. Section 2 specifies that the owner of any public premises,[235] or any public vehicle may take steps that he or she considers necessary to safeguard and protect such a premise. Therefore, nobody may enter any public premises or vehicles without obtaining permission. Another such prescriptive example is the National Key Points Act 102 of 1980, which makes provision for safety at national key points. If it appears to the Minister that damage to, disruption or immobilisation of a place may prejudice the Republic, he or she may declare that place or area a national key point.[236] Access to national key points are restricted.

3.4.1.11 Discretion of the police to restrict or disperse groups

The police may restrict or disperse gatherings, and, in so doing, they effectively limit the right protected in section 17 of the Constitution. Section 9 of the Gatherings Act stipulates that police members may, if they have reasonable grounds to believe that the police will not be able to provide protection for the participants of a gathering or demonstration, prevent the group from proceeding to a different place, deviating from the route, or from disobeying any condition specified. A police member may, if the local authority did not receive a notice more than 48 hours before the gathering, restrict the gathering to a place, or guide the participants along a route to ensure, for example,

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232 Gatherings Act Schedule 1. See also Chapter 4 below.
233 Gatherings Act Schedule 2.
234 Gatherings Act s 7(2).
235 Control of Access to Public Premises and Vehicles Act 53 of 1985 s 1 – 'Public premises' are "any building, structure, hall, room, office, convenience, land, enclosure or water surface which is the property of, or is occupied or used by, or is under the control of, the state or a statutory body, and to which a member of the public has a right of access, or is usually admitted or to which he may be admitted". 'Public vehicle' means "any vehicle, conveyance, ship, boat, craft or aircraft which is the property or under the control of the state or a statutory body, and which is used for the transport, for profit or otherwise, of members of the public".
236 National Key Points Act 102 of 1980 s 2.

that traffic is least impeded, or that there is an appropriate distance between rival gatherings. Police members may also specify an area considered by them to be necessary for the movement and operation of emergency personnel and vehicles, traffic, or for the safe passage of the group. The public may also be excluded from the area.

If a member of the police, above the rank of warrant officer, has reasonable grounds to believe that any potential danger to persons and property cannot be averted by the steps referred to above, he or she must order participants to disperse and to depart from the place within a reasonable time, using a loud voice or an amplified sound system. If the participants do not leave, members of the police may disperse the participants and may use force, excluding the use of weapons likely to cause serious bodily injury or death. The police must ensure the safety of not only the participants, but also of the general public in the vicinity. The police may use force if their own lives are threatened. Hence, participants of gatherings or demonstrations always run the risk that police may interfere or use force against them.

3.4.1.12 Possibility to be prosecuted

Participants who gather, utilising their right to assemble, to demonstrate, to picket and to present petitions, run the risk of being arrested, especially if the gathering or demonstration becomes violent or conditions imposed are not met. The common law and legislation in South Africa provide for numerous offences under which organisers and participants of gatherings and demonstrations can be prosecuted.[237] Organisers can be held liable for technical requirements in the Gatherings Act, for example, not informing the responsible officer that the gathering will not proceed.[238] In the cases of *Mlungwana*[239] and *Tsoaeli*,[240] the effect of sanctioning certain conduct before and during a gathering were considered as having a chilling effect on the exercise of the right protected in section 17 of the Constitution. Criminalisation may come with the loss of liberty, and a previous conviction can be seen as impacting negatively on present and future employment. The stigma of a criminal conviction further deters

237 See paras 4.4 and 4.5 below.
238 Gatherings Act s 12(1)(h).
239 See footnote 106 above.
240 See footnote 114 above.

people from exercising their right to gather.[241]

3.4.1.13 Liability for damage

Depending on the circumstances, it is not only the organiser or participants that may be held liable for riot damages occurring as a result of a gathering. The state potentially may also be held accountable for the failure to protect an individual's right to physical safety, or failure to assist when a gathering moves onto private property and participants damage structures.

In South Africa, the Gatherings Act requires that if riot damage[242] occurs as a result of a gathering or a demonstration, every organisation (any part of it), or the organiser, or a person participating in the demonstration, can be held jointly and separately liable.[243] The court in *SATAWU v Garvas*[244] found that organisers of gatherings are liable for riot damage on a wider basis than under the common law.[245] The court held that the purpose of the limitation of section 17 of the Constitution is to protect the general public, who are usually unable to identify the wrongdoers, and powerless to institute civil action due to the costs it entails.[246] Organisers always run the risk that they may be held liable for damages suffered by third parties during protest action. Liability for riot damage has a dispiriting effect on the exercise of the right to gather. However, in practice, many gatherings, particularly service delivery protests, take place without a transparent leader, organiser or an organisation supporting the protest. Such protest action regularly involves serious damage to state and private property.

3.5 Positive obligation of the state to protect assemblies

The state has a positive duty to protect peaceful and unarmed assemblies, demonstrations, pickets or the handing over of petitions. This duty comprises these

241 See footnote 150 above.
242 Gatherings Act s 1(xv) – 'Riot damage' constitutes "any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering".
243 Gatherings Act s 11.
244 *SATAWU* para [32]. Also see footnote 120 above.
245 *SATAWU* para [32].
246 *SATAWU* para [67].

activities at the time when they take place, or when they are facilitated online.[247] The positive obligation requires from the government to enable and assist participants to gather, and to protect the participants from any person or group who attempt to disrupt a gathering.[248]

The court held in *S v Basson*[249] that there is a constitutional obligation upon the state to prosecute offences which threaten or infringe the rights of citizens. Therefore, where gatherings or demonstrations pose an imminent and direct threat to public security; the government is in its right to prohibit them,[250] or to arrest participants who commit offences whilst the gathering is in procession. The state needs to weigh up the relevant factors and circumstances of each case, to decide how the rights and interests of the participants and the general public must be protected.[251] There are accordingly also negative obligations that include not prohibiting, dispersing or disrupting peaceful gatherings without justification or legitimate cause.[252]

To realise the state's positive duty, the police need to be appropriately trained to protect the human rights of everyone present; participants as well as non-participants. Section 9 of the Gatherings Act obliges a member of the police to act positively if he or she has any reasonable grounds to believe that there is a danger to persons and property as a result of the gathering or demonstration. The police may be held liable if they failed to intervene where it was reasonable to do so. Section 205(3) of the Constitution provides as follow:

> …objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic, and their property, and to uphold and enforce the law.

To achieve the above, the police may employ force, if and when necessary. However, if more force is used than required in the circumstances, the police may face disciplinary action as well as civil and/or criminal liability.

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247 European Commission for Democracy through Law *Guidelines on freedom of peaceful asse*mbly 2010 para [45].
248 ICCPR *General Comment* para [24].
249 *S v Basson* 2004 (1) SACR 285 (CC) para [32].
250 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 43 28.
251 Bekink 2005 *AHRLJ* 408. See also Tenza 2015 *Law, Democracy & Development* 211-231; De Vos 2009 *Without Prejudice* 4-5.
252 ICCPR *General Comment* para [23].

3.6 Conclusion

The Constitution not only provides for the right to assemble, to demonstrate, to picket and to present petitions but also indicates when it may be limited. In South Africa, the Constitution permits for limitations in accordance with section 36. Accordingly, legislation that governs gatherings and the conduct of the executive when facilitating gatherings must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The right to gather is limited by, *inter alia*, the provisions of the Gatherings Act and decisions taken by the government when facilitating gatherings. Although the Constitution protects peaceful gatherings, it depends on the circumstances of each gathering as to what is deemed peaceful. Proper police training is essential since inappropriate police conduct at a peaceful gathering may trigger violence.

This chapter has also examined provisions of the Gatherings Act which already have been the subject of constitutional challenges. In the *Mlungwana*-case, the court found that the criminal sanctions in section 12(1)(a) of the Gatherings Act constitute a limitation to the exercise of section 17 Constitution, since all the appellants acquired criminal convictions for the failure to give notice of a gathering; a gathering wherein the appellants were seeking a response from the local authority as regards an on-going sanitation problem. In the *Tsoaeli*-case, the court concluded that a provision which allows for unarmed and peaceful participants of gatherings to run the risk of losing their liberty for up to a period of one year for merely participating in peaceful protest action undermines the spirit of the Constitution. In the *SATAWU*-case, the court maintained that sections 11(1) and 11(2) of the Gatherings Act hold organisers of gatherings liable for riot damage on a wider basis than under the common law, and that compliance with section 11(2) of the Gatherings Act significantly increased the costs of organising gatherings; therefore, it amounts to a limitation of the right to gather. It is foreseen that the constitutionality of other offences under the Gatherings Act, the common law and other legislation providing for offences that arise from the right to gather, will be the subject of future constitutional challenges. It is accordingly submitted that the government is required to enact national legislation to support and give meaning to section 17 of the Constitution.

Organisers and participants of gatherings always run the risk of being arrested and prosecuted for contravening numerous offences under the provisions of the Gatherings Act, common law or other statutory offences. As such, in the following chapter, offences created under the Gatherings Act will be focused on in more detail.

CHAPTER FOUR

OFFENCES UNDER THE REGULATION OF THE GATHERINGS ACT

4.1 Introduction

In South Africa, the Gatherings Act which regulates public gatherings and demonstrations asserts that "everyone has the right to peacefully assemble with other persons, and to express views on any matter freely in public".[1] Any such peaceful and unarmed assembly is afforded the protection of the state. The Act can accordingly be utilised as an instrument to ensure the right to assemble, demonstrate, picket or to petition as guaranteed in section 17 of the Constitution.[2] The Gatherings Act criminalises certain unlawful conduct in the planning phase of gatherings, and while the gatherings or demonstrations are in progress. When a gathering turns violent, the common law offence of public violence is usually applicable.[3] The Gatherings Act provides for the steps to be taken by persons who want to arrange a gathering. The aim is to balance the right to gather against not unjustifiably infringing on the rights of others.

The Gatherings Act was born after the *Goldstone Commission of Inquiry regarding the Prevention of Political Violence and Intimidation* was established in terms of the Political Violence and Intimidation Act 139 of 1991.[4] The Commission recommended the processes to be followed in order to arrange or organise gatherings, practices during gatherings, the role and duty of the police before and during such gatherings, and the norms and behaviour of participants.[5]

In this chapter, the relevance of the Gatherings Act is considered since gatherings regularly take place without the organisers and participants adhering to the

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1 Gatherings Act Preamble.
2 Constitution s 17. See Chapter 3 above.
3 See Chapter 5 below.
4 See footnote 11 in Chapter 1 above.
5 See Shaw *Recommending peace* 1; as well as the following reports from Goldstone: *Report on the regulation of gatherings and marches; Second interim report*; *Fifth interim report*; *Report by the Committee appointed to inquire into the organisation and conduct off mass demonstrations*; *Report on incidents of violence at Mossel Bay during July 1993* and *Final report*. See also Jacobs 1995 *Die Landdros* 3-6.

requirements of the Act.[6] The police usually arrive on the scene when the gatherings are already in progress. It is, therefore, debatable whether the provisions of the Act are still adequate in the South African context.

Although this chapter focuses on the offences created under the Gatherings Act, it is also necessary to discuss some of the procedures or arrangements under the Act in order to understand how and when these offences can be committed. The Act prescribes the process to notify the government of intended gatherings. It raises the question whether the Gatherings Act is understandable and accessible to the general public. It must be remembered that the Act is the first and sometimes the only reference to the poor, who cannot afford legal advisers.

In South Africa, an organisation needs to appoint a person – called a convener[7] – who is responsible for the arrangements and notification of a proposed gathering to the local authority. The local authority again must appoint a responsible officer[8] who receive the notifications. The responsible officer in turn notifies the authorised member[9] (a member of the police) of the intention to hold the gathering. Time periods are applicable, and possible meetings may be held, conditions may be imposed, or gatherings can be prohibited.

In chapter 3, the constitutionality of certain provisions of the Gatherings Act were discussed, for example, in *Mlungwana*,[10] section 12(1)(a) of the Gatherings Act was declared unconstitutional. In this chapter, the constitutionality of other provisions in the Act are also considered. There is no doubt that several provisions of the Gatherings Act constitute limitations to the right as guaranteed in section 17 of the Constitution.[11] However, whether the limitation is constitutionally justifiable is another question. Furthermore, the offences under the Gatherings Act also need to conform to

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6 Some organisations are pro-active in training the community not to be unlawfully involved in protest action. See Delaney *The right to protest - A handbook for protesters and the police* and FXI *Manual: Regulation of Gatherings Act, 205 of 1993.*

7 The word 'organiser' is preferred to the term 'convener' that is used in the Gatherings Act. See definition of 'convener' below in footnote 46.

8 According to the Gatherings Act s 1(xiv), a 'responsible officer' means: "a person appointed in terms of section 20 2(4)*(a)* as responsible officer or deputy responsible officer, and includes any person deemed in terms of section 2(4)*(b)* to be a responsible officer".

9 Gatherings Act s 1(i) states that an 'authorised member' is "a member of the Police authorized in terms 5 of section 2(2) to represent the Police as contemplated in the said section".

10 *Mlungwana*-case (WCC) para [94]; *Mlungwana* para [112]. See also Omar 2017 *SA Crime Quarterly* 24.

11 See Chapter 3 above.

international human-rights norms and standards.[12] As such, in this chapter's analysis of offences and sentences created under the Gatherings Act, ample reference is made to the *Guidelines on freedom of peaceful assembly*,[13] the *Guidelines on freedom of association and assembly in Africa*[14] and the *General comment no. 37*.[15] A general background to protest action in South Africa is provided for a local perspective on the subject matter, which will firstly be dealt with below.

4.2 Incidence of protest action in South Africa

Protest action is rife in South Africa.[16] The country regularly experiences protest action that involves substantial levels of violence.[17] The Incident Reporting Information System (IRIS), a database maintained by the South Africa Police Service (SAPS), is utilised to record peaceful and violent gatherings.[18] In the years 2012-2013, 1882 peaceful gatherings and 12 399 unrest gatherings were recorded.[19] During the period 1 April 2017 to 31 December 2017, the police reported 10 711 crowd-related incidents,

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12 As illustrated in Chapter 2 above.

13 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2019.

14 ACHPR *Guidelines on freedom of association and assembly in Africa* 2017.

15 ICCPR *General Comment* 1-18.

16 Eggington and Hosken https://www.timeslive.co.za/news/south-africa/2015-09-22-vigilante-rage-born-of-peoples-despair/ (Date of use: 10 October 2020); Mailovich https://www.netwerk24.com/Nuus/Misdaad/Tenk-gebrand-oor-wurms-in-water-20150205 (Date of use: 10 October 2020); Germishuys https://www.pressreader.com/south-africa/beeld/20150205/textview (Date of use: 10 October 2020); Germishuys https://www.netwerk24.com/Nuus/Misdaad/Betogers-wil-in-die-donker-baklei-20150206 (Date of use: 10 October 2020); Keppler https://www.pressreader.com/south-africa/beeld/20150205/2816768433290_43 (Date of use: 10 October 2020); Mailovich https://www.netwerk24.com/Nuus/Hoe-se-seun-vertel-hoe-huis-aangeval-is-20150205 (Date of use: 10 October 2020); Louw-Carstens https://www.netwerk24.com/Nuus/Politiek/Ministers-se-besoek-kal_meer-niemand-20150205 (Date of use: 10 October 2020); Louw-Carstens https://www.netwerk24.com/Nuus/Politiek/Al-meer-protes-kom-2015_0206 (Date of use: 10 October 2020); Msomi 2016-06-19 *Sunday Times* 17. See also the violence involved in the #FeesMustFall campaign in footnote 82 (Chapter 3) above.

17 Marks 2014 *SACJ* 346-376.

18 The IRIS is, however, criticised because of the manner in which data is collected, depending mainly on the police officer responsible for the input of the data, and the responsible officer providing the information. See Marks 2014 *SACJ* 352.

19 Marks 2014 *SACJ* 351. See also Auerbach 2003 *AHRLJ* 275-313, Shearing and Foster 2007 *Acta Juridica* 156-170; Dixon 2000 *SACJ* 69-82, Barron https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2017-02-12-so-many-questions-on-anc-top-brass-implicated-in-state-of-capture-report/ (Date of use: 10 October 2020); Alexander, Runciman and Maruping *SAPS data on crowd incidents* 19-24; Mbazira 2013 *SAJHR* 251-275.

which include 8133 peaceful incidents and 2578 violent incidents.[20]

According to the statistical information on violent protest and industrial action kept by the National Prosecuting Authority (NPA),[21] 185 convictions and 59 acquittals were reported in criminal court cases arising from service delivery protests and industrial action during the period April 2015 to November 2017, and during the period April 2018 to June 2019, 633 convictions and 48 acquittals were recorded.

Although there are a high number of violent gatherings taking place, a relatively small number of prosecutions are instituted, and a low number of suspects are arrested for cases relating to violent gatherings. When cases are referred to the courts, the prosecution generally proceeds under the common law offences of public violence, malicious injury to property, assault, or trespassing under the Trespass Act 6 of 1959. Case law on these types of offences are numerous, however, prosecution and case law with regarded to the offences under the Gatherings Act are very limited. Unfortunately, data with regard to the amount of notifications of gatherings that were received by local authorities is not available to be included in this study.

4.3 Gatherings and demonstrations in the Gatherings Act

International instruments protect the different activities when people gather under the term 'assembly'.[22] The *Guidelines on freedom of peaceful assembly* proclaims an assembly to mean several people jointly and intentionally gathering together in a public accessible place in order to collectively express themselves on a certain matter.[23] An assembly can include a concourse, demonstration, meeting or procession. Every country has its own understanding what an assembly, demonstration, rally, march, meeting, gathering, and so forth, entails or what the purpose of it must be. For example, in Turkey, meetings and demonstrations may be arranged on specific issues to enlighten people and to create public opinion.[24] The French law distinguishes

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20 South African Government https://www.gov.za/speeches/minister-bheki-cele-south-african-police-and-independant-police-investigative-directorate (Date of use: 23 January 2020). See also Chamberlain 2016 *AHRLJ* 365-384.

21 Information collected and centralised by the NPA, received from prosecutors on a monthly basis.

22 See Chapter 2 above.

23 See footnotes 216, 217 in Chapter 2; European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [41], [44].

24 OSCE/ODIHR *Handbook on monitoring freedom of peaceful assembly* 60.

between public meetings and demonstrations; no notification is needed for public meetings but demonstrations, which include marches and rallies on public roads, are subject to prior notification.[25]

In South Africa, section 17 comprising the right to assemble, to demonstrate, to picket and to petition does not contain the word 'gathering'. However, the moniker 'gathering' is utilised in the Gatherings Act, as such, the meaning of 'gathering' must be read into the activities protected in section 17. The definition of a gathering under the Gatherings Act include any assembly, concourse or procession.[26] The Gatherings Act distinguishes between gatherings and demonstrations. The difference is important since different duties are ascribed to organisers of gatherings and to organisers of demonstrations. Notification and some of the offences under the Act are only applicable to gatherings.

According to section 1 of the Act, a demonstration is defined as consisting of no more that fifteen persons protesting in favour of or in opposition to any individual or individuals, any cause, or any conduct or lack of conduct.[27] The definition for a gathering again includes:

> …any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 1989 (Act 29 of 1989), or any other public place or premises wholly or partly open to the air-
>
> (a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or
>
> (b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution, including any government, administration or governmental institution.[28]

It is clear from the above-mentioned two definitions that a gathering regards assemblies, concourses, processions, petitions and pickets if more than fifteen persons gather, while if less than fifteen persons come together, the activity is seen as a demonstration. For a demonstration, notice to the authorities is not required.

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25 OSCE/ODIHR *Handbook on monitoring freedom of peaceful assembly* 25-26.
26 Gatherings Act s 1(vi).
27 Gatherings Act s 1(v); see footnote 40 in Chapter 3 above.
28 Road Traffic Act 29 of 1989.

However, when more than fifteen persons are planning to gather, the authorities need to be notified. For example, in *Rudolph and Others v Minister of Safety and Security and Another,*[29] four adults and four children gathered near Capital Park. Upon arrival, the police informed them that their assembly was an unlawful gathering as they did not have the requisite permission.[30] The group was given time to disperse, and after an hour[31] arrested for, *inter alia*, not notifying the authorities of the intended gathering.[32] Since the appellant and his group were only eight in number while the Gatherings Act requires notification if more than fifteen persons gather in a public place, the court found that the small group did not constitute a gathering within the meaning of the Act.[33] Therefore, there was no evidence of a gathering, and no offence had been committed in the presence of the police.[34]

Although the failure to notify the authorities of an intended gathering is no longer an offence in South Africa, the notification procedure is still applicable and must be adhered to when more than fifteen persons intend to gather. It becomes problematic when a demonstration is held and other people join in solidarity, and suddenly more than fifteen persons are participating. The Gatherings Act is silent on what steps an organiser must take in such circumstances, or how to rectify such situation. In *Mlungwana*,[35] the court considered the appellants' argument that the distinction between a gathering and a demonstration is arbitrary and irrational as it is unclear why sixteen participants is an appropriate number to require notification. The explanation offered by the police for the number of sixteen participants was simply that there had to be a cut-off number.[36] One of the possible reasons why the Act distinguishes between gatherings and demonstrations is that smaller groups do not pose the same threat as larger groups, and, therefore, does not need any regulation from authorities.

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29 *Rudolph and Others v Minister of Safety and Security and Another* 2009 (2) SACR 271 (SCA) (hereinafter *Rudolph and Others*).

30 *Rudolph and Others* para [10].

31 *Rudolph and Others* para [11].

32 *Rudolph and Others* para [12].

33 *Rudolph and Others* para [14].

34 *Rudolph and Others* para [18].

35 *Mlungwana* para [47].

36 See *Mlungwana* para [93] where Petse AJ states: "There appears to be no intrinsic magic in the number 15…". The SAPS Amendment Bill 2020 was published in *GG* 1 October 2020, to invite public comments to address the concerns raised by the *Mlungwana*-judgment. It provides *inter alia* that when more than 50 persons gather in any other public place or premises wholly or partly open to the air, notice is needed (see section 3(1)(b)) and that the convener must not later than four days before the gathering is to be held, give notice to the responsible officer (see section 3(2)). However, the proposed amendments do not address the inherent problems of the Act.

Smaller groups also do not require the same effort from the local authority and police.

A gathering must take place in or on a public road,[37] or public space or premises wholly or partly open to the air. The space must be accessible to the general public. Therefore, an enclosed, indoor, public place does not fall under the definition. A 'premise' is not defined in the Gatherings Act, however, according to the general meaning "the premises of a business or an institution are all the buildings and land that it occupies on one site."[38] 'Premises' can be seen as referring to a site occupied by a business or institution, and, therefore, implies that the public have access thereto. A gathering in a private space, although the intention is to attack the actions of the government, will not fall into the ambit of the Act.[39] The requirement that a gathering must take place in a public space does not form part of the definition of demonstration. A demonstration can take place in a private or public space, indoors or outdoors.

The Constitution does not distinguish between public and private places, as the intention is to protect any place in the Republic. However, it must be kept in mind that the owner of private property still needs to give permission for a demonstration or gathering on his or her property, and that other legislation may be applicable. Although the definition of a gathering includes assemblies as well as pickets and petitioning in public spaces; in practice, picketing[40] or petitioning can take place on an employer's premises which can be a private place depending on the circumstances. If the public has access to premises, it could be deemed to be a public place. According to the *Guidelines on freedom of peaceful assembly*, gatherings can take place on privately owned places, for example, privatised public spaces such as streets, squares and

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37 As defined in s 1 of the National Road Traffic Act 93 of 1996. The Act replaced the previous Act 29 of 1989 (The Road Traffic Act). 'Public road' means "any road, street or thoroughfare or any other place (whether a thoroughfare or not) which is commonly used by the public or any section thereof or to which the public or any section thereof has a right of access, and includes - (a) the verge of any such road, street or thoroughfare; (b) any bridge, ferry or drift traversed by any such road, street or thoroughfare; and (c) any other work or object forming part of or connected with or belonging to such road, street or thoroughfare".

38 Pearsall (ed) *Concise Oxford English Dictionary* "premises".

39 This does not mean that assemblies held inside buildings or on private property are not subject to protection - see *Cisse v France* (Application no 51346/99 9 April 2002); *Acik and Others v Turkey*, 2009). Rather, they are usually subject to different regulations, and there is a greater presumed right to use open public spaces for all forms of public assembly. See OSCE/ODIHR *Handbook on monitoring freedom of peaceful assembly* 11.

40 LRA s 69. See Chapter 3 above.

shopping centres to which the general public has access.[41]

A demonstration and gathering have the same intention – the coming together of persons for an expressive purpose. Both gatherings and demonstrations can have a person, group or government as a target. The definitions in the Gatherings Act providing for gatherings and demonstrations include any coming together of persons – from a burial ceremony to a sporting event, as long as it is for an expressive purpose. The intention of the participants can be social, spiritual or political.[42] The same apply for the definition of a demonstration – it is applicable to any type of event. However, most gatherings in South Africa, for example, sporting events at schools, funerals and church events, which may or may not be politically motivated, take place without any reference to the Gatherings Act or any interference of the authority. The Gatherings Act does not attempt to exclude certain activities, for example, social or spiritual events. In some countries, for example, in Germany, legislation excludes events of crowd entertainment or mass partying.[43] In England, notification is not applicable where the procession is customarily held in a place, or is a funeral procession organised by a funeral director in the normal course of his or her business.[44]

4.4 Offences created by section 12 of the Gatherings Act

The Gatherings Act provides for offences that can be committed before the actual gatherings take place, and while demonstrations and gatherings are in progress. The Act attempts to compel organisers to notify the authorities of an intended gathering, and to ensure that organisers attend meetings deemed important by the authorities. Organisers, participants and marshals must attend to certain duties and adhere to police instructions. In the following paragraphs, certain offences created by the Gatherings Act will be discussed separately. In each discussion, the definition of the particular offence will be provided, and where applicable, the manner in which the offence was applied in case law will be considered.

41 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [83]. See also ICCPR *General Comment* para [10].
42 See Woolman's criticism of the definition of a gathering above in para 3.4.1.2.
43 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* 52.
44 Section 11(2) of the Public Order Act.

4.4.1 Failure to give notice or adequate notice of an intended gathering

A person who unlawfully and intentionally convenes a gathering, without giving notice or adequate notice to the responsible officer from the local authority is guilty of an offence.[45]

In terms of section 3 of the Gatherings Act, the organiser[46] of a gathering must give notice in writing to the responsible officer.[47] When an organiser has not been appointed, the person who has "taken part in the planning, organising or preparations for the gathering or invited the public to attend,"[48] will be deemed to have organised the gathering. A responsible officer must be suitable for the position, and is appointed by the local authority. It is the prerogative of the local authority to decide who is suitable. If a responsible officer is not appointed, the notice must be submitted to the chief executive officer of the municipality, or in his or her absence, to his or her immediate junior.[49] If a local authority does not function in the area, notice must be given to the magistrate, who then needs to fulfil the functions of the responsible officer.[50] It is evident that it may be a time-consuming and confusing exercise for a member of the public to identify the place where notification must take place.

The organiser must give notice at least seven days before the gathering is to be held. The seven-day notice period grants or allows the government leverage to decide if and how to take action against the notification.[51] When it is not reasonable possible to give notice as prescribed above – then it needs to be done at the earliest opportunity.[52]

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45 Section 12(1)(a) of the Public Order Act.

46 The Gatherings Act provides that "an organisation or any branch of an organisation intending to hold a gathering shall appoint a person to be responsible for the arrangements for that gathering and to be present thereat, to give notice in terms of section 3 and to act on its behalf at any consultations or negotiations contemplated in section 4, or in connection with any other procedure contemplated in the Act at which his presence is requires; and a deputy to such a person must be appointed". Section 1(iv) of the Act declares that such a person will be the convener. A convenor also includes any person who, of his own accord, convenes a gathering – following that no structure or entity needs to exist when notice of an intended gathering is given.

47 According to the European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [25], the notification process should not be onerous or bureaucratic, since it may discourage those who wish to hold an assembly.

48 Gatherings Act s 13(3).

49 Gatherings Act s 2(4)(b).

50 Gatherings Act s 3(4).

51 According to the European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [120], the period of notice should not be unnecessarily lengthy but allow adequate time for the relevant state authorities to plan and prepare.

52 Gatherings Act s 3(2).

However, when notice is given less than 48 hours before the commencement of the gathering, the responsible officer may prohibit the gathering.[53] It seems that the responsible officer has the discretion to decide what constitutes 'reasonable possible', and 'at the earliest opportunity'. The decision to proceed with the gathering, or to impose conditions may rely on the decision or whims of only one person, the responsible officer – setting this section at odds with most international instruments.[54]

As regards the notice itself, it must contain the following information:

- the name, address and telephone and facsimile numbers, of the organiser and his deputy,
- the name of the organisation or branch on whose behalf the gathering is convened,
- the purpose of the gathering,
- the time, duration and date of the gathering,
- the place where the gathering is to be held,
- the anticipated number of participants,
- the number of marshals, where possible, the names of the marshals who will be appointed by the organiser, and how the marshals will be distinguished from the other participants in the gathering.[55]

In the case of a gathering in the form of a procession, the notice must comprise of the following details:

- the exact and complete route of the procession,
- the time when and the place at which participants in the procession are to gather, and
- the time when and the place from which the procession is to commence,
- the time when and the place where the procession is to end and the participants are to disperse,
- the manner in which the participants will be transported to the place of assembly and from the point of dispersal,
- the number and types of vehicles, which are to form part of the procession.
- If notice is given later than seven days before the date on which the gathering is to be held, the reason why it was not given timeously.[56]

The Act does not specifically prescribe the requirements for a petition,[57] except that the place and the person to whom it is to be handed over must be mentioned in the notice. Since specific and detailed information are required in the above notifications,

53 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 43 9.
54 See Chapter 2 above.
55 Gatherings Act s 3(3).
56 Section 3(3).
57 See Chapter 3 above regarding acts in South Africa providing for petitioning.

it is foreseen that the time of commencing and ending of the gatherings may be guesswork on the part of the organisers. It is also very difficult to anticipate the number of participants, or number or type of vehicles, or the number of marshals necessary to control the participants. The Gatherings Act does not provide any requirements for how marshals must be distinguished from the rest of the participants, although the LRAA[58] makes available picketing rules which require that marshals need to wear armbands or vests to be identifiable.[59] Funds, in most instances, are not available for special clothing. The Gatherings Act also does not specify whether marshals must be adults, or that they need to attend from the beginning till the end of the gathering.

According to the *Guidelines on the freedom of peaceful assembly*, prior notification must only be required when a government needs to put in place necessary arrangements to facilitate the right to gather, and to protect the public order and safety as well as the rights of others.[60] The G*uidelines on freedom of association and assembly in Africa*, in conformity, states that:

> Participating in and organising assemblies is a right and not a privilege, and thus its exercise does not require the authorisation of the state. A system of prior notification may be put in place to allow states to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens… A notification regime requires that the presumption is always in favour of holding assemblies, and that assemblies not be automatically penalised, through dispersal or sanction, due to failure to notify.[61]

Therefore, the notification procedure can be rebuked if the object of the state is to facilitate the right and to protect the rights of others. However, the process must not amount to authorisation or permission from the authorities to proceed with a gathering.

Different notification standards are required by different countries, for example, in England, an advance notice of six days before the proposed date of the event must be delivered or posted to the police station, or the notice must be delivered by hand as soon as reasonably practicable.[62] In Belgium, authorisation requests must be made

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58 Published in the *GG* 42121 dated 19 December 2018.
59 Default rule 7.5.2.
60 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [25]. See ICCPR *General Comment* para [41].
61 ACHPR *Guidelines on freedom of association and assembly in Africa* para [71].
62 Section 11(4)-(6) of the Public Order Act.

to the mayor of the Belgian municipality at least ten days before the gathering.[63] Notification must be made not less than eight days before the gathering in Algeria; five days in Egypt and Ghana; four days in Mozambique and Zimbabwe; three days in Cameroon and Kenya, and two days in Ethiopia.[64] The international standard for notification is two days, and this allows for sufficient time for the organisers and authorities to discuss differences, and to appeal decisions.[65] The notice period of seven days in South Africa, therefore, seems excessive, and has a restrictive effect on the right of peaceful assembly. In some jurisdictions, for example, in Russia, the Russian Federal Law requires even more detailed information in the notice:

> 1. A notice of holding the public event (except for an assembly and picketing held by a single participant) shall be sent by its organiser in writing to the executive authority of the Subject of the Russian Federation or … local self-government … In the event of a picket by a group of persons, notice of a public event may be submitted no later than three days prior to the holding of that event …
> 3. The notice of holding the public event shall indicate:
> 1) the purpose of the public event;
> 2) the form of the public event;
> 3) the place (places) of holding the public event, routes of passage of participants, and, in the event of a public event to be held with the use of means of transport, information on the use of means of transport;
> 4) date, time of commencement and termination of the public event;
> 5) expected number of participants in the public event;
> 6) forms and methods to be used by the organiser of the public event to ensure public order, the organisation of medical aid, intention to use sound-amplifying technical devices when holding the public event;
> 7) family name, first name, patronymic or denomination of the organiser of the public event, data on his residential address or location and telephone number;
> 8) family name, first name and patronymic of persons authorised by the organiser of the public event to perform managerial functions associated with the organisation and holding of the public event;
> 9) date of submission of the notice on holding the public event.[66]

Detailed personal information with regard to the organiser and persons assisting are required. The requirement in the excerpt at 6) which regards the "forms and methods

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63 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [46].

64 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [61].

65 Peters and Ley *Comparative study on national legislation on freedom of peaceful assembly* para [61].

66 European Commission for Democracy through Law *Federal law on assemblies, meetings, demonstrations, marches and pickets No 54-Fz of 19 June 2004 of the Russian Federation* art 7.

to be used by the organiser to ensure public order" can have a chilling effect on the right to gather.

In England, written notice needs to be given of any proposal to hold a public procession,[67] unless it is not reasonably practicable.[68] The information required in the notice is straight-forward and easy to provide. The notice in England must specify:

- the date when it is intended to hold the procession,
- the time when it is intended to start,
- the proposed route, and
- the name and address of the person (or of one of the persons) proposing to organise it.[69]

In accordance with the *Guidelines of freedom of association and assembly in Africa:*

> Notification procedures shall be non-burdensome… An appropriately simple procedure would involve the filling in of a clear and concise form, available and submittable online and elsewhere, requesting information as to the date, time, location and/or itinerary of the assembly, and the name, address and contact details of principle organiser(s)... Procedures shall be flexible in instances of late notification or submission of incomplete information, with a view to facilitating the conduct of assemblies.[70]

The information required for notification in England seems to be sufficient to notify the police of the gathering. If further details are required, it can always be requested. It is submitted that in comparison to other countries' notification requirements, the information called for by the Gatherings Act in the notice is excessive. It will be difficult for a member of the public, specifically the poor, to obtain all the information as mandated in the notice without assistance. However, the Act does call for the responsible officer to assist the organiser to reduce the notice in writing, upon request.[71] In *Mlungwana*, the court found that the notice involves a considerable effort on the part of the organiser; first to be familiar with the provisions of the Act, and then to satisfy the requirements.[72] It is suggested that the government revisit the information necessitated in the notice, the time-period of notification, as well as how the notice

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67 Section 11 of the Public Order Act. 'Public procession' means "a procession in a public place". According to s 16 of the Public Order Act, a 'public place' constitutes "(a) any highway ... (b) any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission".

68 Public Order Act s 11(6).

69 Public Order Act s 11(3).

70 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [72], [119].

71 Gatherings Act s 3(1).

72 *Mlungwana* para [91].

needs to be submitted.

Although the failure to notify the authorities of an intended gathering does not any longer constitute an offence,[73] the notice procedure as provided by the Act is still applicable. Organisers[74] still need to notify the local authority of a planned gathering, however, there are no consequence if they do not comply. The notice procedure was regrettably not considered by the Constitutional Court in *Mlungwana*. It is foreseen that in future, notification will be problematic and will only proceed in circumstances of planned mass action, or where the assistance of the police is necessary. In practice, many of the provisions of the Gatherings Act are rendered ineffective since section 12(1)(a) of the Gatherings Act was declared unconstitutional. Organisers are aware that if no notice was given, there is no risk that they can be prosecuted for some of the other offences under the Gatherings Act, for example, for not attending a meeting called by the responsible officer (local authority).[75]

Lastly, the use of social media or online methods to facilitate gatherings and protest action is a common practice by organisers and participants in South Africa. However, the Gatherings Act does not expressively provide for online notification of gatherings, which can positively enhance the notification and facilitation procedures. A simple online notification, 24 hours before the event, to the nearest police station where the gathering will take place, can be adequate to alert the authorities. The LRAA[76] already provides that online methods may be utilised to assist during pickets, for example, to report changes in the identities of the marshals and organisers. It is suggested that the Gatherings Act follow suit.

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73 Section 12(1)(a) of the Gatherings Act was declared unconstitutional in *Mlungwana*-case (WCC) para [101]; *Mlungwana* para [112]. The Constitutional Court concluded in para [101] that this section is not 'appropriately tailored' to facilitate peaceful gatherings, and that the nature of the limitation is too severe to render this provision constitutional since there are less restrictive means available to achieve the same result. This offence was not applicable to demonstrations or gatherings as an immediate response to an event or spontaneous gathering.

74 Gatherings Act s 1(xi): 'Organisation' means "any association, group or body of persons, whether or not such association, group or body has been incorporated, established or registered in accordance with any law".

75 Gatherings Act s 12(1)(b).

76 Published in the *GG* 42121 dated 19 December 2018.

4.4.2 Failure to attend a meeting called by the responsible officer after the organiser gave notice of a proposed gathering

If the organiser of a gathering, or any person after giving notice to the local authority of the intention to hold a gathering, unlawfully and intentionally fails to attend a meeting to discuss the contents of the notice, amendments thereof, additions thereto, or any conditions to be imposed on the gathering as directed by the responsible officer of the local authority, he or she is guilty of an offence.[77]

This offence is relevant when the responsible officer (local authority),[78] after receiving notice of a proposed gathering from an organiser, is of opinion that negotiations are necessary, and calls a meeting with the organiser and other relevant role players in order to discuss amendments of the contents of the notice and conditions.[79] Proof will be required that the message (regarding the time and place of the meeting) was conveyed to the organiser. Therefore, the responsible officer needs to keep proper track of dates, timeframes, reasons, notifications received, and other relevant information. This information is required to properly investigate a case of contravention of section 12(1)(b) of the Act.

The section is applicable to gatherings where there is an intention to inform relevant stake holders. The section is not applicable to demonstrations or when the gathering is an immediate response to an event or spontaneous,[80] or where no notice was given. However, as the convening of a gathering without giving notice or adequate notice to the responsible officer no longer constitutes an offence, a void in the proper planning and execution of gatherings arises. It is ironic that an organiser cannot be prosecuted if he or she fails to notify the responsible officer, however, when he or she did notify the responsible officer, and fails to attend a meeting, prosecution can be instituted.

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77 Gatherings Act s 12(1)(b).

78 Gatherings Act s 1(xiv): 'Responsible officer' means "a person appointed in terms of section 2(4)(a) … it is a suitable person appointed by the local authority or the chief executive officer or his immediate junior, or the magistrate if a local authority does not exist or is not functioning."

79 Gatherings Act s 4(2)(b).

80 The gatherings occur when a group of people gather at a particular location but without any prior arrangements or planning in response to some incident. See European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [79]. In South-Africa, spontaneous gatherings take place frequently. In some instances, community members, who are divided into street committees, gather when an offence is committed, e.g., to apprehend the perpetrator of an offence, or to assist with searching for a missing child. The offence or incident triggers the gathering. These gatherings regularly turn violent, since participants take the law into their own hands, with grave consequences for the alleged suspect.

The nature of this limitation is severe, and there are less restrictive means available to facilitate gatherings.

Apart from the requisite notice, the Gatherings Act obliges local authorities to set up a meeting with the organiser and other interested parties within 24 hours after receiving notification.[81] In terms of section 4 of the Act, the responsible officer and the authorised member must consult regarding the necessity for discussions.[82] If the responsible officer is of the opinion after the consultation that discussions are not necessary, and that the gathering can take place as specified in the notice, he or she must notify the organiser accordingly.[83] If the organiser has not been called to a meeting within 24 hours after notification, the gathering may take place in accordance with the contents of the notice. Circumstances where the notice of the responsible officer does not reach the organiser can be challenging. The organiser may wish not to be reached. If the organiser gives notification on a Friday or before a public holiday, the 24 hours' period can already lapse before attention to the notice could be given, or before the notice of the responsible officer could be received. If the identity or whereabouts of the organiser is unknown, the responsible officer can publish the conditions and the reasons in a notice, newspaper, on radio or television, or affix it at the address of the organiser as specified in the notice.[84]

If the responsible officer is of opinion that discussions are necessary, a meeting must be called with the relevant persons or bodies[85] to discuss the contents of the notice, amendments thereof, additions thereto, and any conditions to be met.[86] The responsible officer must ensure that the discussions take place in good faith.[87] Regrettably, the responsible officer's perception of what 'good faith' entails, may play a decisive role. Once the meeting takes place, the responsible officer is "given a significant degree of discretion in deciding whether or not to prohibit the gathering".[88] If an agreement cannot be reached on the contents of the notice, the responsible

81 Gatherings Act s 4(3).
82 Gatherings Act s 4(1).
83 Gatherings Act s 4(2)(a).
84 Gatherings Act s 4(5)(a).
85 Gatherings Act s 4(2)(b).
86 Gatherings Act s 4(2)(c).
87 Gatherings Act s 4(2)(d).
88 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* 43 11.

officer can impose conditions with regard to the holding of the gathering.[89] The responsible officer must give written reasons for the conditions imposed.[90] However, the conditions imposed can render the reason for the gathering ineffective.

As soon as the organiser becomes unable to perform or continue with his or her functions, the organisation may appoint another person. However, after another person was appointed, no further appointments can be made without the approval of the responsible officer.[91] If the responsible officer withholds approval, the organisation will be unable to adhere to the provisions of the Act, or will need to approach the courts for assistance. Section 2(2)(b) of the Act also provides that after a new member of the police was designated as authorised member, no further designation can be made except with the approval of the responsible officer. Again, if the responsible officer withholds approval that a new member of the police may be designated, the organisation will be unable to continue with the proposed gathering. These provisions can be seen as strange, since the local authority may restrict the police to perform their duties by withholding approval. It is also ironic that protest action can be aimed at the service delivery of dysfunctional municipalities to whom notice must be given of the intended gathering. It is debatable whether an independent and fair decision can be made if there is awareness that the protest action is directed against the local authority.[92]

Section 2(3) of the Gatherings Act states that when the organiser or police member is not available, the consultation or meeting can continue in their absence – however, the police or organisation will be bound by the decisions. Effectively, it means that the local authority (consisting of the responsible officer – a single person) will decide how and where the gathering will proceed without the relevant parties at the table. The subjective beliefs and political affiliation or views of the responsible officer may play a part in his or her decision-making. It is, therefore, difficult to understand that if the meeting can proceed without the organiser, that the failure of the organiser to attend

89 The conditions can ensure proper arrangements regarding vehicular or pedestrian traffic, rush hour traffic, distances between two rival gatherings, access to property and workplaces, and prevention of injury to persons and property. See Gatherings Act s 4(4)(b).

90 Gatherings Act s 4(4)(c).

91 Gatherings Act s 2(c).

92 Chamberlain 2016 *AHRLJ* 375-376 mentions the difficulties a group of women encountered when they wanted to arrange a march after 44 mine workers were killed during a strike near Marikana. The women's notices to the relevant municipalities were rejected, denying the women their right to protest.

the meeting constitutes an offence. The purpose for the consultation and negotiation is unclear when the organiser is not present at the meeting. Prosecution will also be problematic if the organiser did not attend the meeting, and is arrested for failing to adhere to the conditions imposed by the responsible officer,[93] especially if the decision of the responsible officer was irrational, or based on inexperienced or incorrect facts.

This notification procedure is extensive, and cannot be seen as a simple, user-friendly process. Chamberlain is of opinion that these provisions in:

> …the Gatherings Act are misunderstood – or deliberately improperly applied by municipal officials, since they routinely operate on the basis that the organisers of a protest are required by the Gatherings Act to ask for permission to proceed.[94]

The fact that the gathering can be prohibited or allowed to continue pending certain conditions to be met, creates the impression that 'permission' needs to be obtained from the responsible officer before the gathering may proceed. When permission is required to proceed with a gathering, the right protected in section 17 of the Constitution is restricted.

4.4.3 Failure to comply with the duties of the organiser, marshal or participants at a gathering or demonstration

Any person, who unlawfully and intentionally, contravenes or fails to comply with any provision of section 8 in regard to the conduct at a gathering, or when applicable at a demonstration is guilty of an offence.[95] Section 8 determines the duties of the organiser and marshals, and prohibits certain conduct of participants and other persons present at the gathering or demonstration. It also criminalises the compelling of any person in any manner whatsoever to join a gathering or demonstration. Section 8 provides for gatherings where notification was given by the organiser to the responsible officer, since many of the duties are linked to the contents of the notice.[96] However, since the failure to notify the local authority of an intended gathering is no longer an offence, the relevance of failure to adhere to several of the duties in section 8 are debatable.

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93 See Gatherings Act s 12(1)(c).
94 Chamberlain 2016 *AHRLJ* 377.
95 Gatherings Act s 12(1)(c).
96 *Mlungwana* para [20]. The notice process is discussed above at para 4.4.1.

The duties under section 8 of the Gatherings Act were designed to ensure that gatherings are peaceful, orderly, and properly managed. When organisers and participants do not have access to administrative and financial support, it can be problematic to adhere to these duties. Once masses gather and bystanders join in solidarity, it may be impossible to attend to these duties. Therefore, organisers may decide not to notify the authorities, and not to run the risk of being prosecuted for certain offences under the Act.

The duties of the organiser before, during and after the gathering entail the following:

- the appointment of the number of marshals mentioned in the notice,
- the taking of necessary steps to ensure that the gathering at all times proceeds peacefully,
- that the notice and conditions specified are complied with,[97]
- that all the marshals are clearly distinguishable,[98]
- that all reasonable steps are taken to ensure that the marshals and participants, are timeously and properly informed of the conditions.[99] The organiser and the authorised member (police member) must, respectively, ensure that every marshal and every member of the police present at the gathering are informed of the contents of the notice, including any amendment or condition,[100]
- that the gathering proceeds and take place at the location or on the route and in the manner and during the times specified in the notice.[101]
- the taking of all reasonable steps to ensure that no persons have in his or her possession any airgun, firearm, imitation firearm or any muzzle loading firearm, as defined in section 1 of the Firearms Control Act 60 of 2000 or any object which resembles a firearm and that is likely to be mistaken for a firearm or any dangerous weapon, as defined in the Dangerous Weapons Act 15 of 2005.[102]
- to take all reasonable steps to ensure that no person, before or during a gathering or demonstration, compel or attempt to compel any person to participate in the gathering or demonstration.[103]

Although the police and local authority can assist organisers with guidance and manpower to adhere to these duties, it is evident that it is difficult to attend to all the duties of an organiser under section 8 of the Act. The Act is silent on how the organiser must appoint the marshals. There is also no requirement in the Act that the marshals

97 Gatherings Act s 12(1)(d) is also applicable.
98 Gatherings Act s 8(1).
99 Gatherings Act s 8(2).
100 Gatherings Act s 4(5)(b).
101 Gatherings Act s 8(3).
102 Gatherings Act s 8(4).
103 Gatherings Act s 8(6).

appointed must be present from the beginning until the end of the gathering. The marshals appointed may moreover leave during the gathering or be completely absent. The Act further does not indicate how marshals must be distinguishable from the rest of the crowd.

Under the Act, it is expected from the organiser and marshals to control the gathering. It will be an extremely difficult task at larger gatherings, if not impossible, to establish if the organiser distributed to each and every marshal the required information with regard to how the gathering must proceed. Persons who join while the gathering is underway may not receive the necessary information as well. The larger the gathering, the more difficult it is to adhere to the notice and conditions. When the organiser does not have financial or administrative support, it is debatable if he or she will be able to take the necessary steps to ensure that the gathering proceeds peacefully. Training for organisers is furthermore not a prerequisite, as such, a person with no experience in crowd control is required to identify steps to ensure a peaceful gathering.

It is unclear from the Act what reasonable steps the organiser needs to take to ensure that nobody has a firearm or a dangerous weapon in their possession. This may indeed be impossible to ascertain since the Act does not allow for each participant to be searched. It is lastly also vague what reasonable steps the organiser needs to take to ensure that nobody is compelled to participate in the gathering or demonstration. When masses gather, the organiser will not be able to personally monitor the behaviour of each participant.

If the organiser is prosecuted, it will be the duty of the court – after listening to all the facts – to decide what reasonable steps the organiser could have taken. The *Guidelines on freedom of peaceful assembly* provides that organisers of gatherings must not be held liable for failure to perform their responsibilities when they have made reasonable efforts to do so.[104] The organisers also must not be held liable for the actions of individual participants, or for the conduct of bystanders.[105]

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104 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [224].

105 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [224].

In certain countries, the duties of organisers are excessive. According to the Russian Federal Law,[106] an organiser is obligated during a public event to see to the following duties:

> 3) to ensure compliance with the conditions for holding the public event specified in the notice …
> 4) to require that the participants in the public event comply with the public law and order and also with the rules of procedure for holding the public event. Persons who fail to comply with the lawful requirements of the organiser of the public event may be sent away from the place of holding the public event;
> 5) to ensure, within their respective competence, public order and security of citizens when holding the public event and… to perform that obligation jointly with the authorised representative of the executive authority… complying in so doing with all their lawful requirements;
> 6) to suspend or terminate the public event in case of perpetration by its participants of any illegal actions;
> 7) to ensure compliance with the norm of the maximum holding capacity… at the place of holding the public event;
> 8) to provide for the safety of plantations, premises, buildings, structures, installations, equipment, furniture, implements and of other property at the place of holding the public event;
> 9) to bring to the notice of participants in the public event the requirements of the authorised representative of the executive authority… regarding suspension or termination of the public event;
> 10) to bear a distinctive sign of the organiser of the public event. An authorised representative shall also carry a distinctive sign.

In Russia, it is also expected from the organiser to terminate the event when participants commit unlawful acts. In South Africa, it is debatable if the organiser of a gathering will be able to stop a violent gathering. Shortage of funds will hamper the duty to provide for the safety of buildings, structures or installations. These duties have a restricting effect on the freedom of peaceful assembly. According to the *General Comment,* organisers or participants do not need to arrange for, or to contribute towards the costs of policing or security, medical assistance or cleaning.[107] However, it can be helpful in the South African context if the organiser and the senior police member assigned with the facilitation of the gathering, wear distinctive clothing. They

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106 European Commission for Democracy through Law *Federal law on assemblies, meetings, demonstrations, marches and pickets No 54-Fz of 19 June of the Russian Federation* 4-5.

107 ICCPR *General Comment* para [64]. See European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [89], [155]; ACHPR *Guidelines on freedom of association and assembly in Africa* paras [96], [102].

will be easily identifiable to assist with problematic issues.

Marshals may be appointed to manage the participants of a gathering.[108] According to the Gatherings Act, the duties of the marshals during the gathering entail the following:

- to take all reasonable steps to ensure that entrances to building or premises are not barred so that reasonable access is denied to any person,
- that no entrance to a hospital, fire or ambulance station or any other emergency services, is barred by the participants,[109]
- to take all reasonable steps to ensure that no persons have in his or her possession any airgun, firearm, imitation firearm or any muzzle loading firearm, as defined in section 1 of the Firearms Control Act 60 of 2000 or any object which resembles a firearm and that is likely to be mistaken for a firearm, or any dangerous weapon, as defined in the Dangerous Weapons Act 15 of 2013.
- to take all reasonable steps to ensure that no person, either before or during a gathering or demonstration, is compelled to join or participate in the gathering or demonstration.[110]

The Act does, however, not provide for any crowd-control training for these appointed marshals. Marshals are generally not independent persons, but form part of, or are appointed from the heart of the organisation (persons sharing the same beliefs or having the same political aims). To proceed peacefully may not be beneficial for the organisation to highlight their concerns. Marshals are also not subsumed under law enforcement since law enforcement remains the responsibility of the police.[111] The appointment of marshals is furthermore not a legal requirement.[112]

The *Guidelines on freedom of peaceful assembly* suggests that marshals[113] must receive appropriate training, thorough briefing before the assembly takes place, and should be familiar with the area in which the assembly is being held.[114] The Act does not stipulate any such training, nor is there any available instruction with regard to a suitable age or age limit for marshals, therefore, grade 8 schoolchildren may be utilised as marshals. The organiser in charge of the assembly must inform the marshals what

108 Gatherings Act s 8(1) – can be read into the duties.
109 Gatherings Act s 8(9).
110 Gatherings Act s 8(6).
111 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [156].
112 ICCPR *General Comment* para [65].
113 Stewards do not have the powers of law enforcement officials, and should not use force but must aim to obtain the cooperation of the assembly participants.
114 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [193].

is expected from them during the protest. Yet, it is difficult to establish if incorrect information is distributed to them. Lastly, the Act does not describe how the marshals must be identified from the other participants. The *Guidelines on freedom of peaceful assembly* suggests that it is desirable that they wear special bibs, jackets, badges or armbands.[115]

The appointment of marshals is no guarantee that a gathering is controllable, or that the participants will adhere to their instructions. In the *SATAWU*-case, the union organised a gathering of thousands of people.[116] SATAWU gave notice of the gathering to the local authority, and appointed about 500 marshals to manage the crowd.[117] It advised its members to refrain from any unlawful and violent behaviour, and requested the local authority to clear the roads of vehicles and erect barricades along the route.[118] However, the gathering still resulted in riot damage estimated at R1.5 million.[119] Several people died, and many participants were injured or arrested.

Participants of assemblies have particular charges as required by section 8 of the Gatherings Act. These include not having in their possession any airgun, firearm, imitation firearm, or any muzzle-loading firearm, as defined in section 1 of the Firearms Control Act 60 of 2000, or any object which resembles a firearm and that is likely to be mistaken for a firearm, or any dangerous weapon, as defined in the Dangerous Weapons Act 15 of 2013.[120]

Any persons present at a gathering – not only participants – are prohibited from inciting hatred on account of differences in culture, race, sex, language or religion by way of a banner, placard, speech, singing, or in any other manner,[121] or performing any act or uttering any words which are calculated or likely to cause or encourage violence against any person or group of persons.[122] These persons present may also not wear a disguise or a mask or any other apparel or item which obscures their facial features and prevents identification,[123] or wear any form of attire that resembles any of the

115 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [194].
116 *SATAWU* para [10].
117 *SATAWU* para [11].
118 *SATAWU* para [11].
119 *SATAWU* para [11].
120 See footnote 24 in Chapter 3 for the full definition.
121 Gatherings Act s 8(5). See also footnote 189 in Chapter 3 above.
122 Gatherings Act s 8(6).
123 Gatherings Act s 8(7).

uniforms worn by members of the security forces, including the police and the South African Defence Force,[124] Such persons may also not compel or attempt to compel any person to attend, join or participate in the gathering or demonstration.[125]

It is usually not problematic to hold an individual participant liable who was found in possession of a firearm, or to identify a participant with a mask or clothing resembling the uniforms of the security forces. A person inciting hatred,[126] encouraging violence or compelling any person to join a gathering or demonstration may also be identified and arrested[127] while the gathering or demonstration continues. However, due to the Covid-19 pandemic, members of the public are obliged to wear masks. According to the *General Comment*, the wearing of masks, or the taking of steps to participate anonymously is not in itself a sign of violent intent, and must be allowed.[128] Flags, uniforms, signs and banners are regarded as legitimate forms of expression, even if such symbols are reminders of a painful past.[129] Although above-mentioned are only guidelines, police members assigned to facilitate gatherings must be adequately trained to take proper decisions.

The police are regularly criticised by the general public as being passive while watching violence taking place. Although a specialised public order police unit is trained to manage and control crowds with a view to restore public order,[130] it is usually the local police members who are first on the scene, and who assist with facilitating gatherings.[131] These police members did, in general, not receive any formal crowd-management training, they were not part of the negotiation process, and are not in possession of the necessary equipment (specifically video apparatus and cameras) to assist with evidence in court. To properly support the right to assemble, demonstrate, picket or to hand over petitions, local police members must be properly trained, and

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124 Gatherings Act s 8(8).
125 Gatherings Act s 8(10).
126 Gatherings Act s 8(5).
127 Gatherings Act s 8(10).
128 ICCPR *General Comment* para [60].
129 ICCPR *General Comment* para [51].
130 See National Instruction 4 of 2014 s 20(t). According to the standard operating procedure, first responders at station level in terms of protest action, attacks of foreign nationals, land invasions and evictions (Letter of Lieutenant General E Mawela dated 3/3/2017 at 3 (Responsibilities) – members at the local police station are not required to have any formal crowd management training – only some knowledge and experience of crowd management.
131 See Barron https://www.timeslive.co.za/sunday-times/opinion-and-analysis/2017-02-12-so-many-questions-on-anc-top-brass-implicated-in-state-of-capture-report/ (Date of use: 10 October 2020).

assigned to assist with gatherings.

Participants of violent gatherings are sometimes arrested to minimise the danger to persons and property, without a clear indication how they contributed to an offence. Obtaining evidence to proceed with prosecution is challenging when the police have no knowledge of the duties and requirements of section 8 of the Act. The police officials who were part of the negotiation process are usually not part of the actual supervising of the gathering or the investigation process. When dockets are forwarded to the prosecution, most of the information regarding the planning phase of the gatherings is not available, or unknown. Most of the information pertaining to the duties of the organiser would consist of the knowledge of the organiser him- or herself – the person accused of not adhering to the duties. In practice, it is almost impossible to establish if all reasonable steps have been taken to inform the marshals timeously and properly of the conditions of a gathering. A central body which manage information from the planning of a proposed gathering until the completion thereof, and the investigation of offences committed, can contribute to the peaceful facilitation of gatherings.

It is difficult to prove that participants were not intimidated, thus participating against their will, or being compelled to attend[132] – a popular defence in protest action cases. Persons compelled or intimidated to attend gatherings or demonstrations will not open cases due to the fact that they are fearful. The police furthermore struggle to differentiate between onlookers who mingle with the crowd and actual participants. The only available witnesses are usually community members residing in the same community as the participants. They are, therefore, not willing to testify in court.

[132] Joubert https://www.netwerk24.com/nuus/onderwys/leerlinge-glo-gedwing-om-te-betoog-20170307?mobile=true (Date of use: 10 October 2020) reports of school principals who reported that learners were forced out of classroom to join the protest action in the Barberton-area. This is also the view of the researcher, a senior public prosecutor employed by the NPA, with 30 years' experience in criminal prosecution. Many of the examples refer to are gained from dealing personally with cases that arise from the right to gather.

When riot damage[133] occurs as a result of a gathering (every organisation on behalf of or under the auspices of which that gathering was held, or the convener) or a demonstration (every person participating in such demonstration), they may be jointly and severally liable for the riot damage as joint wrongdoers,[134] together with any other person who unlawfully caused or contributed to the damage.[135] It is a defence to a claim against a person or organisation, when the act or omission which caused the damage in question was not permitted or planned, that it did not fall within the scope of the objectives of the gathering or demonstration; it was not reasonably foreseeable, and all reasonable steps were taken to prevent the act or omission.[136]

4.4.4 Failure to comply with the notice of a gathering or a condition to which the holding of a gathering or demonstration is subject

Any person (including the organiser and participants) who knowingly and intentionally contravenes or fails to comply with the contents of a notice or a condition, to which the gathering or demonstration is subject, is guilty of an offence.[137] If an organiser has not, within 24 hours after giving notice, been called to a meeting by the responsible officer (local authority), the gathering may take place in accordance with the contents of the notice as given by the organiser.[138] When a meeting was held between the organiser and the local authority, and an agreement was reached, the gathering may take place in accordance with the contents of the notice, including amendments, as agreed.[139] The organiser and participants of a gathering must adhere to the contents of the notice

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133 Gatherings Act s 1 states that 'riot damage' means "any loss suffered as a result of any injury to or the death of any person, or any damage to or destruction of any property, caused directly or indirectly by, and immediately before, during or after, the holding of a gathering". The Gatherings Act does not provide that the police can be held liable for riot damages occurred which could have been prevented if the police acted timeously. In *Yarl's Wood Immigration Ltd & Ors v Bedfordshire Police Authority* [2008] EWHC 2207 (Comm), [2009] 1 All ER 886, the issue before the court was whether the authority responsible for an immigration detention centre can claim under the Riot (Damages) Act 1886 against the relevant police authority in respect of damage to, or destruction of property in the centre caused by those detained in it during a riot. In *Mitsui Sumitomo Insurance Co (Europe) Ltd & Anor v The Mayor's Office for Policing and Offence*: [2013] WLR(D) 356, [2013] EWHC 2734 (Comm), the Sony Warehouse was destroyed by fire, and looting took place during widespread civil disorder and rioting. The claimants were the insurers of Sony, seeking compensation from the defendant, which is the statutory body responsible for the oversight of the Metropolitan Police, under the Riot (Damages) Act 1886 in respect of losses.

134 As contemplated in Chapter II of the Apportionment of Damages Act 34 of 1956.

135 Gatherings Act s 11(1).

136 Gatherings Act s 11(2).

137 Gatherings Act s 12(1)(d).

138 See para 4.4.1 above.

139 Gatherings Act s 4(4)(a).

and any agreement reached.

This offence excludes circumstances where the responsible officer *imposes* conditions on the gathering, or *prohibits* the gathering from proceeding. This offence excludes conditions imposed in terms of section 4(4)(b),[140] 6(1),[141] or 6(5)[142] of the Act – these provisions are included under the offence created by section 12(1)(f) of the Act.[143]

When the organiser has not, within 24 hours after giving notice, been called to a meeting, the gathering may take place in accordance with the contents of the notice (as planned and suggested by the organiser).[144] The Act requires from local authorities to set up a meeting with the organiser and other relevant parties, within 24 hours of receipt of the notification, when amendment of the notice contents is necessary. In terms of section 4, the local authority (responsible officer) and the police (authorised member) must consult regarding the necessity for negotiations.[145] However, the *Guidelines on freedom of peaceful assembly* holds that any participation in the pre-

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140 Gatherings Act s 4(4)(b) – "If at a meeting contemplated in subsection (2)(b) agreement is not reached on the contents of the notice or the conditions regarding the conduct of the gathering, the responsible officer may, if there are reasonable grounds therefore, of his own accord or at the request of an authorised member impose conditions with regard to the holding of the gathering to ensure - (i) that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; or (ii) an appropriate distance between participants in the gathering and rival gatherings; or (iii) access to property and workplaces; or (iv) the prevention of injury to persons or damage to property".

141 Gatherings Act s 6(1)(a) – "Whenever a condition is imposed in regard to a gathering in terms of section 4(4)(b) or when a gathering is prohibited in terms of section 5(2), the convener of such gathering may apply to an appropriate magistrate for the setting aside of such prohibition or the setting aside or amendment of such condition, and the magistrate may refuse or grant the application. (b) Whenever an authorised member in terms of section 4(4)(b) requests that a particular condition be imposed and the request is refused, or whenever information contemplated in section 5(1) is brought to the attention of a responsible officer and the gathering in question is not prohibited, an authorised member may, if instructed thereto by the Commissioner or the district commissioner of the South African Police for the area where the gathering is to be held, apply to an appropriate magistrate to set aside such refusal or to prohibit such gathering, as the case may be, and the magistrate may refuse or grant the application".

142 Gatherings Act s 6(5) – "Notwithstanding the provisions of subsections (1), (2) and (4), the convener, authorised member or any person whose rights may be affected by the holding of a gathering or by its prohibition or by any term in a notice or any condition imposed or failure to impose any condition in relation to a gathering may by means of an urgent application in accordance with the Uniform Rules of the several Provincial and Local Divisions of the Supreme Court of South Africa, apply to an appropriate court for the striking out or amendment of any such term or condition or the imposition of any other condition or for permission to hold, or for a prohibition of, the gathering, and the court may strike out or amend any such term or condition or impose any other condition or grant such permission or prohibit the gathering, as it deems fit".

143 See para 4.4.5 below.

144 Gatherings Act s 4(3).

145 Gatherings Act s 4(1).

event planning with the authorities must be voluntary.[146]

The organiser and participants are bound to the information they have supplied in the notice, conditions or amendments agreed to during the meeting with the responsible officer. When anybody fails to comply with the information or a condition in the notice, an offence is committed. The information regarding notices, meetings, amendments and conditions must be meticulously kept by the responsible officer. Prosecution without this evidence will be problematic. Usually, information with regard to the notification process is not available in police dockets.

4.4.5 Convening a gathering in contravention of the provisions of the Act, or to convene and attend a gathering or demonstration that is prohibited

Any person (including the organiser and participants) who unlawfully and intentionally convenes a gathering or convenes or attends a gathering or demonstration prohibited in terms of the Act is guilty of an offence.[147] To arrange a gathering in contravention of the Act, or to arrange or attend a gathering or demonstration knowing it is prohibited in the vicinity of courts, the Parliament and Union buildings,[148] constitutes an offence.

The first part of section 12(1)(e) of the Gatherings Act is not applicable to demonstrations (i.e. when less than fifteen persons gather). The second part is applicable to demonstrations and gatherings (when more than fifteen persons gather). If notice of a gathering was not given less than 48 hours before the commencement of the gathering, the responsible officer may by notice to the organiser, prohibit the gathering.[149] The gathering can therefore be prohibited before any meeting was held. Reasons seem to be that due to the shortage of time, the meeting and the negotiations necessary between the relevant parties cannot take place, or that the responsible officer is convinced that the gathering is a risk to the safety of the community.

After a meeting was conducted between the responsible officer and the organiser, section 5 holds that the responsible officer can prohibit the gathering, if convinced on reasonable grounds that no amendment or condition will prevent a threat to the rights

146 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [124].
147 Gatherings Act s 12(1)(e).
148 See discussion on restricted zones or places in para 3.4.1.10 above.
149 Gatherings Act s 3(2).

of others. When a gathering is prohibited by the responsible officer, the Minister of Safety and Security,[150] or a court; the police must bar access to the place, and give notice that it is closed to the public, for such time as may be necessary to prevent the gathering from taking place.[151] The police may take reasonable and appropriate steps in this regard.[152] The place must be kept closed or inaccessible to the public in order to prevent the gathering from taking place.[153]

Section 5 leaves the discretion to prevent or to prohibit a gathering in the hands of the responsible officer. When credible information under oath is brought to the attention of the responsible officer that there is a threat[154] which will result in serious disruption of vehicular or pedestrian traffic, injury to participants or other persons, extensive damage to property, and the police and the traffic officers will not be able to contain this threat, he or she must meet with the organiser, the police and any other relevant stakeholder.[155] When the responsible officer is after the meeting convinced that no amendment or condition of the notice would prevent the occurrence of any circumstances contemplated, he or she can prohibit the proposed gathering, and must give reasons for his or her decision.[156] Credible information will be based on available operational information:

> …taking into account the level of the risk, discussions and arrangements with the convenor, history of peaceful or violent protests by the parties involved, past experience with the parties, suitability, vicinity or venue in terms of alleviating or aggravating risk, and so forth.[157]

The prohibition of a gathering will therefore depend on the existing circumstances surrounding the intended gathering. According to the *Guidelines on freedom of*

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150 See para 4.6.2 below. Regulations published in terms van the Disaster Management Act 57 of 2002, prohibited gatherings during the period of lockdown (Covid-19 pandemic) in South Africa.

151 Gatherings Act s 6(6).

152 Gatherings Act s 6(6)(c). During the #FeesMustFall-movement in South Africa, universities obtained court orders prohibiting gatherings on campuses. Students felt that the police presence is in excess of what can be seen as reasonable or appropriate. See *University of Cape Town v Rhodes Must Fall and Others* (20182/2015) [2015] ZAWCHC 151 (19 October 2015), eNCA https://www.enca.com/south-africa/violence-of-feesmustfall-protests-has-damaged-cause-2016-matric-class (Date of use: 27 December 2020); Gasa and Dougan https://www.groundup.org.za/article/fees-must-fall-2016-where-here/ (Date of use: 28 December 2020); Genever https://www.sabreakingnews.co.za/tag/fees-must-fall (Date of use: 28 December 2020).

153 Gatherings Act s 6(6)(a).

154 The National Instruction 4 of 2014 9-10 provides a threat assessment and the categorising thereof into levels 1-3.

155 Gatherings Act s 5(5)(1).

156 Gatherings Act s 5(3).

157 National Instructions 4 of 2014 s 9(2).

association and assembly in Africa, less intrusive responses must be considered, and prohibition must be the only and last resort.[158] All gatherings must be presumed to be peaceful in the absence of convincing evidence that the organiser or the participants intend to use violence or incite imminent violence.[159] The Gatherings Act does not require a level of experience or training with regard to the responsible officer. The responsible officer's own political perception can, therefore, play a role in the decision-making.

In England, when the chief officer of police reasonably believes that, because of particular circumstances existing in a district, the powers under section 12[160] will not be sufficient to prevent a public procession resulting in serious public disorder, he or she must apply to the council of the district for an order prohibiting the public procession for a period not exceeding 3 months.[161] On receiving such an application, a council may, with the consent of the Secretary of State, make such an order.[162] The same applies to the Commissioner of Police for the City of London or the Commissioner of Police of the Metropolis.[163] In contrast, in South Africa, one person employed by the local authority can prohibit gatherings. The Gatherings Act also does not specify that a gathering may be prohibited for a period of time. However, it is a more constitutionally sound principle that when a gathering is prohibited due to inciting circumstances, it can continue after a certain time period. In England, a constable in uniform who reasonably believes that a person is on his or her way to an assembly which is prohibited, can stop that person, and direct him or her not to proceed in the

158 ACHPR *Guidelines on freedom of association and assembly in Africa* para [92].

159 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [86].

160 Public Order Act s 12: "If the senior police officer, having regard to the time or place at which and the circumstances in which any public procession is being held or is intended to be held and to its route or proposed route, reasonably believes that — (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community, or (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do, he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him necessary to prevent such disorder, damage, disruption or intimidation, including conditions as to the route of the procession or prohibiting it from entering any public place specified in the directions."

161 Public Order Act s 13(1).

162 Public Order Act s 13(2).

163 Public Order Act s 13(4). Section 13(5) states: "An order made under this section may be revoked or varied by a subsequent order made in the same way".

direction of the assembly.[164] It could be beneficial to adopt a similar approach in South Africa since such legislation may assist to deflect busses full of potential participants away from violent scenes or prohibited gatherings.

To attend a prohibited gathering is an offence in terms of the Act. In the *Tsoaeli*-case, the question before the court was whether a gathering where no notice was given by the organiser became automatically prohibited. The appellants in the *Tsoaeli*-case appealed their conviction of contravening section 12(1)(e) of the Gatherings Act. The appellants were part of the staff establishment of the Free State Department of Health who were dismissed. The dismissed employees decided to hold a night vigil outside the headquarters of the Department of Health. When the first group of protestors gathered outside the premises, the police demanded to see documentary proof that notice was given to the local authority. When none was provided, the crowd were notified that the gathering was illegal, and ordered to disperse. On non-compliance, they were arrested.[165] After sunrise, a second group of protestors gathered, and the same happened to them.[166] Both groups of protestors were not armed or violent.[167] The court found that section 12(1)(e) of the Act is not couched in a language that unequivocally proclaims that a gathering for which no prior notice was given is automatically prohibited.[168] The court mentioned that the Gatherings Act only requires prior notice, and not that consent is granted.[169] The court was of the opinion that the participants in the first group had believed that prior notice was given, and with regard to the second group, the court found that the gathering was spontaneous.[170] The court did not adjudicate on the appellants' application in respect of the constitutionality of section 12(1)(e) of the Act.

In *Mlungwana*, the court referred to the *Tsoaeli*-case and distinguished between a prohibited gathering and a gathering for which no notice was given:

> Importantly, all parties agreed that it does not constitute an offence to attend a gathering for which no notice has been given. But it is an offence to attend a prohibited gathering. However, it must be emphasised that an unnotified gathering

164 Public Order Act s 14C(1). See United Kingdom Government Department of Constitutional Affairs *A Guide to the Human Rights Act 1998* 24.
165 *Tsoaeli* para [3].
166 *Tsoaeli* para [4].
167 *Tsoaeli* para [5].
168 *Tsoaeli* para [35].
169 *Tsoaeli* para [43].
170 *Tsoaeli* para [43].

> is not necessarily a prohibited gathering. A gathering can be prohibited if notice is given less than 48 hours before the gathering is meant to commence, or if it is prohibited under section 5 … On 'reasonable grounds' that no amendment to the notice given as contemplated in section 4(2)(b) or no unilateral imposition of conditions as contemplated in section 4(4)(b) would prevent a threat to the rights of others from the proposed gathering, may the responsible officer prohibit the gathering. Nowhere does the Act expressly provide that the mere failure to give notice is a ground to prohibit the gathering and render participation in it an offence under section 12(1)(e).[171]

In practice, when the local authority is not notified of a gathering, there is no risk that a gathering can be prohibited by the responsible officer, or that participants can be prosecuted for attending a prohibited gathering. Failure to notify the local authority of a proposed gathering is no longer an offence. To attend a meeting of which no notification was given is also not an offence. This position questions whether sections 4(2)(b) and 5 of the Gatherings Act are still relevant. The position is further complicated since people join gatherings or demonstrations during different times and stages, not knowing it is prohibited. The police can allow a peaceful prohibited gathering to continue, thereby creating the expectation that they will allow peaceful prohibited gatherings also in the future to continue.

As discussed in paragraph 3.4.1.10 above, section 7 prohibits demonstrations and gatherings in the vicinity of courts,[172] buildings of Parliament, the Union Buildings, and

171 *Mlungwana* paras [17]-[19].

172 Gatherings Act s 7(1)(a) determines that all demonstrations and gatherings in any building in which a courtroom is situated, or at any place in the open air within a radius of 100 metres from such building, on every day of the week, except weekends and public holidays are prohibited, except when permission was granted in writing by a magistrate.

in certain specified areas[173] as contained in Schedule 1[174] and 2[175] of the Act. Written permission for demonstrations and gatherings in these areas need to be obtained from the Chief Magistrate of Cape Town or the Director-General: Office of the State President.[176] In contrast, according to the *General comment*, the designation of places such as courts and parliament as areas where gatherings may not take place, must be avoided since it is public spaces.[177]

However, on a daily basis, gatherings and demonstrations take place within a radius of 100 meters from court buildings without obtaining the written permission of the magistrate. Due to the fact that no notices of such gatherings are given, the police are caught unaware;[178] not having the manpower to assist timeously at the scenes. Although the police monitor the gathering or demonstration, they do not interfere if it stays peaceful, and does not threaten the safety of the public or damage to property. Therefore, the police are creating the expectation that a peaceful gathering in a prohibited area without obtaining the permission of the magistrate will be allowed to

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173 Gatherings Act s 7(1)(b). See Schedule 1 and 2 of the Act. These areas include some streets in the City of Cape Town and in Pretoria.

174 Gatherings Act Schedule 1 – "The area bounded by the following streets in the City of Cape Town, namely Queen Victoria Street from the point where Queen Victoria Street and Museum Avenue meet, up to the point where Queen Victoria Street and Wale Street meet, up to the point where Wale Street and St. George's Street meet, up to the point where St. George's Street and Longmarket Street meet, up to the point where Longmarket Street and Corporation Street meet, up to the point where Corporation Street and Barrack Street meet, up to the point where Barrack Street and Coffee Lane meet, up to the point where Coffee Lane and Commercial Street meet, up to the point where Commercial Street and Nieuwmeester Street meet, up to the point where Nieuwmeester Street and Hope Street meet, up to the point where Hope Street and Tuinplein Street meet, up to the point where Tuinplein Street and Vrede Street meet, up to the point where Vrede Street and St. John's Street meet, up to the point where St. John's Street and Gallery Avenue meet, up to the point where Gallery Avenue and Government Avenue meet, up to the point where Government Avenue and Museum Avenue meet, up to the point where Museum Avenue and Queen Victoria Street meet, including the surface of the said streets and the pavement on either side thereof".

175 Gatherings Act Schedule 2 – "The area in Pretoria bounded by the following: (a) To the south, the continuing line 100 metres south of the south side of the tarred road which is situated to the south of the Union buildings and which connects Edmond Street and Government Avenue with one another. (b) To the west, from the junction of Edmond Street and the tarred road referred to in paragraph (a), the line extending due north up to the crest of Meintjieskop and the line extending due south from the said junction up to where it intersects the line referred to in paragraph (a). (c) To the east, from the junction of Government Avenue and the tarred road referred to in paragraph (a), the line extending due north up to the crest of Meintjieskop and the line extending due south from the said junction up to where it intersects the line referred to in paragraph (a). (d) To the north, the line along the crest of Meintjieskop extending between the northern points of the first-mentioned lines referred to in paragraphs (b) and (c)".

176 Gatherings Act s 7(2).

177 ICCPR *General Comment* para [56].

178 Spontaneously public protests catch the SAPS off-guard, and make it very difficult for them to plan for proper contingency measures. It is, however, arguable if public protests are spontaneous, or if the police are caught off-guard due to a lack of intelligence.

continue. This situation strengthens the assumption that it is not necessary to adhere to the provisions of the Act.

4.4.6 Failing to comply with a condition imposed on the gathering

Any person (including the participants and organiser) who knowingly and intentionally contravenes or fails to comply with a condition imposed by the responsible officer (who may impose conditions to the holding of a gathering), or who fails to comply with conditions or a refusal ordered by a magistrate or judge, (when the organiser applies to a court to set aside the prohibition or conditions of a gathering), is guilty of an offence.[179] The responsible officer may, when there are reasonable grounds, on his or her own accord, or on request of a police member impose conditions to ensure that vehicular or pedestrian traffic, especially during traffic rush hours, is least impeded; an appropriate distance between participants in the gathering and rival gatherings are kept; access to property and workplaces are not impeded; and injury to persons or damage to property are prevented.[180]

The responsible officer may impose conditions on a gathering not due to any other reasons. When the responsible officer imposes conditions or refuses a request of the police, he or she must give written reasons for his or her decision.[181] The written reasons must as soon as possible be handed to all the parties who attended the meeting (called by the responsible officer after receiving notice of a proposed gathering). If the organiser is not satisfied with the decision of the responsible officer, he or she may within 24 hours after the responsible officer has given notice of the imposition of conditions or refusal to allow the gathering to continue, apply to a magistrate to challenge the decision.[182] The notice of the responsible officer remains in force until set aside by the court.[183] Section 6(3)(c) of the Act bars magistrates from awarding costs when an organiser seeks to have an order prohibiting a gathering set aside, although the High Court may still award costs. Though the High Courts may be better suited to assess competing expressive and public order interests, the Act

179 Gatherings Act s 12(1)(f).
180 Gatherings Act s 4(4)(b).
181 Gatherings Act s 4(4)(c).
182 Gatherings Act s 6(1).
183 Gatherings Act s 6(4).

channels the impecunious conveners toward the Magistrates' Court.[184] The magistrate, very often unfamiliar with the Act, and taking the Magistrates' Court Rules on 'urgent' applications at their word, turns down the convener's application to have the prohibition set aside. All the parties – from the convener, to the local authority, to the magistrate – have complied with the required procedures, and yet no gathering, and no meaningful assessment of the grounds for prohibition, take place.[185] Even worse, local authorities often take more than a week to reply to a properly filed notice, violating section 4(3) of the Act. The police or any person whose rights may be affected by the holding of a gathering or by its prohibition or by any condition or lack thereof, may also bring an urgent application to an appropriate court.[186]

4.4.7 Failure to comply with an order given by the police or interfering with any steps taken by the police

Any person who unlawfully and intentionally fails to comply with an order issued, or interferes with any steps taken by the police during a gathering or demonstration, is guilty of an offence.[187] Amongst the unlawful conduct proscribed is proceeding to a different place or deviate from the route specified; disobeying any condition; not adhering to an instruction to restrict the gathering to a place or a route;[188] interfering or attempting to interfere with a gathering or demonstration; not ceasing with certain conduct; not remaining at a distance, or not dispersing and departing when called upon to do so.

Section 9 provides for the powers bestowed on the police during gatherings and demonstrations. The section is applicable whether the organisers or participants adhere to the provisions of the Act or not, but the provisions of the section will not be applicable when police arrive at a scene where violent conduct is already in progress, for example, when a group of people attack a community. In application of their duty in this section, police members may, when they have reasonable grounds to believe that the police will not be able to provide adequate protection for the people

184 Woolman, Bishop and Brickhill Constitutional *Law of South Africa* 43-11.
185 Woolman, Bishop and Brickhill Constitutional *Law of South Africa* 43-14.
186 Gatherings Act s 6(5).
187 Gatherings Act s 12(1)(g).
188 Gatherings Act s 9(1)(c).

participating in the gathering or demonstration, notify the organiser and participants.[189] They may also prevent participants in the gathering from proceeding to a different place, or to deviate from the route specified, or from disobeying any condition.[190] Furthermore, when the responsible officer did not receive notice more than 48 hours before the gathering, the police member may restrict the gathering to a certain place, or guide the participants along a particular route to ensure that traffic is least impeded. The police member should likewise ascertain that there is an appropriate distance between rival gatherings; that there is access to property or workplaces; and take such steps, including negotiations, to protect persons and prevent damage to property.[191] When an incident, whether or not it results from the gathering or demonstration, causes persons to gather at any public place, the police may specify an area considered necessary for the movement and operation of emergency personnel and vehicles, or the passage of a gathering or demonstration or the movement of traffic or the exclusion of the public from the vicinity or the protection of property.[192] The police official may order any person or group to stop interfering with a gathering or demonstration, or to cease certain conduct or to remain at a distance.[193]

When a gathering is prohibited,[194] or if a member of the police with the rank of warrant officer has reasonable grounds to believe that danger exists to persons and property, and that it cannot be averted by the steps referred to above – he or she[195] can call upon the participants to disperse, by obtaining their attention by suitable lawful means, and then,[196] in a loud voice order them in a language understood by the majority of the persons present, to disperse and to depart within a reasonable time.[197]

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189 Gatherings Act s 9(1)(a).
190 Gatherings Act s 9(1)(b). This conduct is not applicable to demonstrations.
191 Gatherings Act s 9(1)(c), (f).
192 Gatherings Act s 9(1)(e).
193 Gatherings Act s 9(1)(d).
194 See Gatherings Act s 6(6).
195 National Instruction 4 of 2020 s 14: "The use of force and dispersal of crowds must only be conducted by those members of Public Order Police (POP) trained in crowd management and equipped with the relevant crowd management equipment. The situation must be contained by members of Visible Policing at station level and Metro Police until POP members can take over the situation. If it is not possible to contain the situation or wait for POP to arrive, only members of Visible Policing at station level and Metro Police members trained in crowd management with the relevant equipment, may use the necessary force".
196 Gatherings Act s 9(2)(a)(i).
197 Gatherings Act s 9(2)(a)(ii). According to the National Instructions 4 of 2014 s 16 – "The warning must be audible and must include the action that will be taken against them, and is applicable should defensive measures fail. The warning should, if the circumstances permit, include an explanation of the steps that are going to be taken to disperse the crowd and should give the

When the participants have not left the area or made no preparations to leave, the officer may order the members of the police to disperse the persons, and may order the use of force, excluding the use of weapons likely to cause serious bodily injury or death.[198] The degree of force must not be greater than is necessary for dispersing the persons, and must be proportionate to the situation and the object to be attained.[199] If any participants or any person who hinders or interferes with the participants kills or seriously injures, or attempts, or shows an intention of killing or seriously injuring any person, or destroys or serious damage or attempts or shows an intention of destroying or to do serious damage, to valuable immovable or movable property, he or she may order the law enforcement members to take the necessary steps to prevent the illegal conduct, including the use of firearms and other weapons.[200]

According to the National Instructions,[201] force may only be used upon the command of the operational commander,[202] except when the police member acts in private defence:[203]

> If the use of force is unavoidable, – (a) the purpose of offensive actions must be to de-escalate conflict with the minimum force to accomplish the goal and therefore the success of the actions will be measured by the results of the operation in terms of loss of life, injuries to people, damage to property and cost; (b) the degree of force must be proportional to the seriousness of the situation and the threat posed in terms of situational appropriateness; (c) it must be reasonable in the circumstances; (d) the minimum force must be used to accomplish the goal; and

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participants enough time to disperse peacefully; yet, the time should not be so long that it gives the participants the impression that the police are not serious. In cases of violence immediate action may be required. A second warning must be given in at least two official languages and if possible also in the language that is most commonly spoken in that area before the commencement of the offensive measures, giving innocent bystanders the opportunity to leave the area. In cases where violence has already started the time frame should be shortened immediately". This is similar to the situation in Canada where the Criminal Code RSC 1985 c C-46 s 67 provides that a justice, mayor, sheriff, or warden must, after receiving information that twelve or more persons are unlawfully and riotously assembled, and that a riot is in progress, approach and command silence, and in a loud voice instruct the participants to disperse to their homes or businesses. Anyone who opposes or hinders the justice or other delegated person, or does not depart within thirty minutes after the order was given, is guilty of an indictable offence, and liable to imprisonment for life. See Criminal Code RSC 1985 c C-46 s 68.

198 Gatherings Act s 9(2)(b).

199 Gatherings Act s 9(2)(c). See OHCHR *Guidance on Less-Lethal Weapons in Law Enforcement* iii; the guidelines are designed to assist governments to supply law enforcement officials with the means to determine whether force is necessary in a particular situation and how to react to it.

200 Gatherings Act s 9(2)(d).

201 National Instructions 4 of 2014 s 14(9).

202 'Operational commander' means "an operational officer or member who is responsible for the operational execution and coordination of an operation, and who has been designated in writing". See National Instructions 4 of 2014 s 2(q).

203 See Tait and Marks 2011 *SA Crime Quarterly* 15-22. This article offers recommendations for a model of public order policing in South Africa that is more effective and respectful of human rights.

(e) the use of force must be discontinued immediately once the objective has been achieved; (f) if the participants are going to be dispersed, make sure that they have enough escape routes in order to try and avoid serious injuries or possible deaths as a result of a stampede; (g) If dispersion is unavoidable, an attempt must be made to disperse the participants in the direction of a positive attraction point (an area where participants would most likely be willing to move to); and (h) always implement gradual police response.[204]

Woolman[205] argues that after the Constitutional Court's judgment in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters & Another*[206] and the Supreme Court of Appeal's decision in *Govender v Minister of Safety and Security*,[207] section 9(2)(d) of the Gatherings Act, authorising the use of firearms "where there is merely an intention to 'destroy ... or damage property' must be viewed as constitutionally suspect".[208]

According to the *Guidelines on freedom of peaceful assembly*, negotiation and mediation are important tools to be used by the police during gatherings to de-escalate conflict.[209] The Gatherings Act also proposes negotiation to protect persons and

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204 National Instruction 4 of 2014 s 13(1), according to ss 13(5)-(8), the following items are prohibited during crowd management operations: "(a) Pepper spray (or capsicum) is prohibited, unless the relevant commander has issued a specific instruction to do so (pepper spray may not be used in confined spaces or a stadium where it could lead to a stampede); (b) firearms and sharp ammunition including, birdshot (fine lead pellets) and buckshot (small lead pellets) are prohibited; and (c) teargas (CS) may be used only by POP members on command of the operational commander in situations that allow for its use, but never in stadia or confined spaces that could lead to a stampede. Approved rubber rounds may only be used as offensive measures to disperse a crowd in extreme circumstances, if less forceful methods have proven ineffective. Approved 40 mm rounds may only be used on command. All other measures (such as water cannons, crowd management trained equestrian units, etc.) may only be utilised upon the command of the operational commander".

205 Woolman, Bishop and Brickhill (eds) *Constitutional law of South Africa* Chapter 43 16.

206 *Ex Parte Minister of Safety and Security and Others: In Re S v Walters & Another* 2002 (2) SACR 105 (CC). This case concerns the constitutionality of statutory provisions that permit force to be used when carrying out an arrest.

207 *Govender v Minister of Safety and Security* 2001 (2) SACR 197 (SCA). Section 49(1) of the Criminal Procedure Act 51 of 1977 was applicable in the *Govender*-case where the plaintiff's minor son was shot while he was pursued on foot by a policeman who stopped the stolen motor car driven by the son. The court concluded in para 2 that "in reading section 49(1) consistently with the Constitution, the proportionality of the force to be permitted in arresting a fugitive must be determined not only by the seriousness of the relevant offence but also by the threat or danger posed by the fugitive to the arrester, to others or to society at large". The court was of opinion that it is "a rational and equitable way of balancing the interests of the state, society, the police officers involved, and of the fugitive and a proper mechanism for balancing collective against individual interests". See paras [9]-[24].

208 Woolman, Bishop and Brickhill (eds) *Constitutiona*l *Law of South Africa* Chapter 43 16. See Rutinwa *Article 19: Freedom of association and assembly* 65.

209 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [169]. See OHCHR *Guidance on less-lethal weapons in law enforcement* iii – the guidelines are designed to assist governments to supply law enforcement officials with the means to determine whether force is necessary in a particular situation, and how to react to it.

property.[210] The fact that the Gatherings Act provides for police powers does not mean that the police must utilise it. Non-intervention may be the best way to ensure peacefulness. The dispersing of gatherings for the reason that the organisers did not comply with conditions, or deviated from the terms in the notice – without any unlawful conduct by the participants – is not permitted.[211] Prosecution becomes problematic when police actions and instructions escalated violent conduct during gatherings, or the police force's decision-making was irrational, or based on inexperience. Training and proper management by the police of protest action is essential to guarantee the right to gather, however, educating the public to exercise their rights responsibly and to understand what conduct is deemed unacceptable, is the antithesis.[212]

4.4.8 Failing to notify the responsible officer that the gathering will not proceed

If the organiser or any person, unlawfully and intentionally, fails to notify the responsible officer that the gathering is postponed, delayed, cancelled or called off, he or she is guilty of an offence. [213] Consequently, the organiser has a duty to notify the responsible officer if the gathering is postponed, delayed, cancelled or called off. The intention to punish the failure to inform the responsible officer is possibly linked to the expenditure and manpower which accompany the policing of gatherings and demonstrations. The Gatherings Act does not provide that wasteful expenditures can be claimed from the organiser or organisation who did not proceed with a gathering as indicated in a notice to the local authority. When the gathering is cancelled, the notice given in terms of section 3 will in effect be deemed cancelled. When the responsible officer is notified that the gathering will be delayed or postponed, he or she can call a meeting to discuss the postponement or delay.

Prosecution under this section will be challenging, since the Act does not provide for any timeframes. The organiser can inform the responsible officer minutes before the gathering is due to start that it is cancelled, and accordingly escape prosecution. The state must also prove that the organiser intentionally failed to inform the responsible

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210 Gatherings Act s 9(1)(f).

211 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [176]. Dispersal is only allowed if there is an imminent threat of violence, offences are committed, or the gathering seriously violates the rights of others.

212 Sampson 2010 *AHRLJ* 455.

213 Gatherings Act s 12(1)(h).

officer – a misunderstanding or forgetfulness will not be sufficient for criminal liability. The failure to notify the authorities of an intended gathering is no longer criminalised, however, if the organiser notifies the authorities of a proposed gathering, and then fails to inform the local authority that the gathering is cancelled, a punishment of one-year imprisonment can be applicable. It is ironic that when the local authority was not informed of the intention to hold a gathering, there is no risk to be prosecuted for failure to inform the responsible officer that the gathering is not proceeding. The nature of the limitation in this provision is severe. It is suggested that the provision is unconstitutional since there are less restrictive means available to achieve the same purpose.

4.4.9 Supplying false information for the purposes of the Act

Any person, who unlawfully and intentionally supplies or furnishes false information for the purposes of this Act, is guilty of an offence. [214] Any person may include the organiser, marshals, participants, members of the public, police, bystanders, representatives of relevant bodies, local authorities and police community forums. False information can be supplied with regard to facts or circumstances before or during the gathering or demonstration. It may also consist, for example, of information supplied in the notice, information supplied to the responsible officer during the meeting, or information supplied to the authorised member or to the police on the scene.

4.4.10 Hindering or obstructing a member of the police, the responsible officer, the organiser, a marshal or another person in the exercise of his or her powers or duties

Any person who intentionally and unlawfully, hinders, interferes with, obstructs, or resists a member of the police, responsible officer, organiser, marshal or other person in the exercise of his powers or the performance of his duties, is guilty of an offence.[215] Not adhering to an instruction of the responsible officer (an employee of the local authority), or the organiser and marshal can be seen as hindering, interfering, obstructing or resisting. Conduct may, for example, include hindering the organiser to

214 Gatherings Act s 12(1)(i).
215 Gatherings Act s 12(1)(j).

notify the responsible officer of a planned gathering,[216] stopping the organiser from giving notice seven days before the gathering is to be held,[217] hampering the responsible officer to establish the identity of the organiser of a gathering,[218] preventing the responsible officer to call a meeting,[219] thwarting the discussions at the meeting to proceed,[220] obstructing the gathering to take place in accordance with the contents of the notice,[221] or by preventing the authorised member to give notice that that place or area is closed or inaccessible to members of the public.[222]

This offence is broader than the offence under the SAPS Act which provides that a member of the service must not be hindered or obstructed.[223] Practically, it will be possible to prosecute a member of the police, responsible officer, organiser, marshal or any other person if they hinder, interfere with, obstruct or resist each other in the exercise of their powers or the performance of their duties under the Gatherings Act.

4.4.11 Being in possession of a firearm or dangerous weapon during a gathering or demonstration

No participant at a gathering or demonstration may have in his or her possession any airgun, firearm, or a simulated firearm, or any dangerous weapon.[224] The organiser and marshals have the duty to take all reasonable steps to ensure that this section is complied with. If not, they may risk prosecution under section 12(1)(c) of the Act. The Act does not provide for the organiser and marshals to search participants before and during gatherings. It must be highlighted that the Act also does not provide for the training of organisers or marshals with regard to firearms.

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216 Gatherings Act s 2(2)(b).
217 Gatherings Act s 3(2).
218 Gatherings Act s 3(2)(c).
219 Gatherings Act s 4(2)(b).
220 Gatherings Act s 4(2)(c).
221 Gatherings Act s 4(4)(a).
222 Gatherings Act s 6(6)(b).
223 SAPS Act s 67 arranges that "any person who resists or wilfully hinders or obstructs a member in the exercise of his power or duties or wilfully interferes with such member's uniform or equipment is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months".
224 Firearms Control Act s 12(1)(k). See footnote 24 Chapter 3 for the full definition. Firearms Control Act s 1 states that a 'dangerous weapon' means "any object, other than a firearm, capable of causing death or inflicting serious bodily harm, if it were used for an unlawful purpose".

Since the offences under the Firearm Control Act and Dangerous Weapons Act are also applicable,[225] the prosecution can decide under which Acts to institute prosecution. The prescribed sentences for carrying any object referred to in section 12(1)(k) of the Act is a fine or imprisonment for a period not exceeding three years. It must be taken into consideration that a firearm may be properly licenced and belong to the participant. The Firearm Control Act provides for a period of imprisonment not exceeding 15 years when the firearm is unlicensed. Section 3 of the Dangerous Weapons Act again provides for a fine or imprisonment for a period not exceeding three years.

4.5 Sentences under the Gatherings Act

When convicted of contravening section 12(1)(a)-(j) of the Gatherings Act,[226] the prescribed penalty is a fine or imprisonment for a period not exceeding one year, or both such fine and such imprisonment. As mentioned in paragraph 4.4.11 above, section 12(1)(k) of the Act stipulates that anyone who is found in possession of any proscribed or dangerous weapon[227] during a gathering or demonstration, is liable to a fine or to imprisonment for a period not exceeding three years.

The provisions of the Gatherings Act[228] must not be interpreted as to detract from the provisions of the Control of Access to Public Premises and Vehicles Act 53 of 1985, the Dangerous Weapons Act 15 of 2013, the Firearm Control Act 60 of 2000, the Trespass Act 6 of 1959 or the Criminal Procedure Act 51 of 1977. The prosecution select under which Act prosecution is to be instituted. The prescribed penalties are more substantial under most of the aforementioned Acts.

Section 1 of the Trespass Act avers that any person who, without the permission of the lawful occupier or owner in charge of land or building, enters or is upon such land or building, is guilty of an offence, and on conviction liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding two years, or to both such fine

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225 Firearms Control Act s 3 provides that no person may possess a firearm unless he or she holds a license, permit or authorisation issued in terms of the Act.
226 See paras 4.4.1 - 4.4.10 above.
227 See para 4.11 above.
228 Gatherings Act s 13.

and such imprisonment.

Under the Intimidation Act 72 of 1982, certain forms of intimidation are prohibited, and when a person is convicted, he or she is liable to a fine not exceeding R40 000, or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.[229] In cases of intimidation of the general public, a particular section of population, or inhabitants of particular area,[230] a person will be liable to a fine which the court may in its discretion deem fit, or to imprisonment for a period not exceeding 25 years, or to both such fine and such imprisonment.

The Control of Access to Public Premises and Vehicles Act provides for the safeguarding of certain public premises, vehicles, and for the protection of people. Section 2(2) provides that no person may without the permission of an authorised officer enter upon any public premises or any public vehicle.[231] Any person who contravenes the provisions is guilty of an offence, and liable on conviction to a fine not exceeding R2 000, or to imprisonment for a period not exceeding two years, or to both that fine and that imprisonment.[232] In terms of section 66(1) of the SAPS Act, it is an offence to wear any uniform or distinctive badge or anything materially resembling a uniform of the SAPS.[233] Any person who contravenes the provisions is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.

In contrast, the *Guidelines on freedom for peaceful assembly* recommends that any penalties for offences committed during a gathering must be necessary and proportionate:

> Unnecessary or disproportionately harsh sanctions for behaviour during assemblies could, if known in advance, inhibit the holding of such events and have a chilling effect that may prevent participants from attending. Such sanctions could thus constitute an indirect violation of the freedom of peaceful assembly. Penalties for minor offences that do not threaten to cause or result in significant harm to public order or to the rights and freedoms of others should accordingly be low and

229 Intimidation Act ss 1(1), 1A(1).
230 Intimidation Act s 1A.
231 Control of Access to Public Premises and Vehicles Act s 1.
232 Control of Access to Public Premises and Vehicles Act s 4.
233 It is also an offence under s 104(5) of the Defence Act 42 of 2002 as amended, to "possess or wear a prescribed uniform, distinctive marks or crests, or perform any prohibited act while wearing such uniform or distinctive marks or crests".

the same as minor offences unrelated to assemblies.[234]

The punishment for contravening the provisions created in the Gatherings Act is significant. A person can, for example, acquire a criminal conviction for the failure to inform the local authority that a gathering was cancelled.[235] By attempting to arrange a gathering, the organiser can already acquire a heavy sentence, while the calamitous effects of a previous conviction recorded against an individual are well-known.

4.6 Other legislation influencing aspects of gatherings

Other legislation may also be utilised to prosecute certain necessary aspects when people come together, for example, emergency care, or safety precautions at gatherings. Sometimes legislation co-exist with the Gatherings Act, and on occasion it is not applicable. The Regulations relating to Emergency Care at Mass Gathering Events[236] are applicable to mass events involving more than 1000 participants. The Safety at Sports and Recreational Events Act 2 of 2010 focuses on the safety of persons and property at events. However, the Safety at Sports and Recreational Events Act explicitly exclude gatherings arranged in terms of the Gatherings Act from its application.[237] Times of emergency or disaster can also allow governments to ban gatherings for extensive periods.

4.6.1 Emergency Care at Mass Gathering Events

The Regulations relating to Emergency Care at Mass Gathering Events are applicable to mass gatherings, which are defined as "an event where the expected attendance is more than 1,000 participants simultaneously present at any given time",[238] or when less than 1000 participants are expected, but the gathering is considered a high-risk[239]

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234 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [22].

235 Gatherings Act s 12(1)(h).

236 Enacted in terms of section 90 of the National Health Act 61 of 2003, published in *GG* 40919 dated 15 June 2017, *GN* 566.

237 See Chapter 5 below.

238 Regulation 1 and 2(1) of the Emergency Care at Mass Gathering Events. See also para 3.4.1.7 above, footnote 220.

239 According to the Regulations relating to Emergency Care at Mass Gathering Events s 1, a 'risk' is seen as the "probability of harmful consequences or losses (deaths, injuries, damage to property, disrupted economic activity or environmental damages) resulting from interactions between hazards and vulnerable conditions that is quantified".

event.[240] An 'event' includes:

> …an entertainment event (including live acts), a recreational, educational, cultural, religious event, a political rally, a business event (including marketing, public relations and promotional), a charitable, exhibitional, conferential, organisational event and similar activities hosted at a stadium or a venue or along a route or its precinct.[241]

The regulations specifically focus on emergency medical care at gatherings. The Regulations must be read together with the Gatherings Act. In the Regulations, Annexure B, Table 1 provides for the allocation of a score based on the nature of the event, and gatherings and demonstrations are specifically mentioned as an event.

The regulations place substantial duties on the organiser to arrange for emergency care at events, and give the Emergency Medical Service Manager the power to prohibit the event when concerns are not met.[242] The organiser needs to, *inter alia,* conduct a risk assessment,[243] to consult with the event medical service provider, and to prepare plans to show the layout of the venue, entries and exit points, emergency routes, medical facilities and triage areas, positioning of toilets, merchandising stalls, and parking.[244] The organiser must also take responsibility for the cost of providing all health and medical services for the event.[245] The assessments must also be submitted to the Emergency Medical Service Manager at least six weeks prior to the event taking place.[246]

It is understandable that mass gatherings must be planned well in advance due to the number of persons attending. However, the applicable time period of six weeks can seriously hamper the expressive nature of protest action or marches. The period is extensive, and can derail the reason for holding the event. The regulations also provide that the organiser is responsibility for the costs of providing health and medical services for the event. The Regulations is in disagreement with the *Guidelines on freedom of peaceful assembly* which provides that the government should not levy

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240 Regulation 2(2) of the Emergency Care at Mass Gathering Events. See para 3.4.1.7 above, footnote 221.
241 Regulations relating to Emergency Care at Mass Gathering Events s 1.
242 Regulations 10 and 12 of the Emergency Care at Mass Gathering Events.
243 Regulation 3(1) of the Emergency Care at Mass Gathering Events.
244 Regulation 3(2) of the Emergency Care at Mass Gathering Events.
245 Regulation 3(4) of the Emergency Care at Mass Gathering Events.
246 Regulation 6(1) of the Emergency Care at Mass Gathering Events.

charges on organisers to provide for policing, medical services or health and safety.[247] For example, in *Govsha v Belarus*,[248] the application to hold a gathering was not accompanied by receipts indicating that services relating to the protection of public order and security, medical facilities, and cleaning at the end of the meeting had been paid, therefore, the application was denied.[249] In *Poliakov v Belarus*,[250] the request to hold a gathering was rejected since the organisers could not present a letter to prove that medical care will be available during the demonstration.[251] In both these cases, it was held that the rights of the applicants were violated.

Without assistance to complete the mandatory application, the necessary knowledge to adhere to the requirements of the Regulations, and the requisite funds to pay for expensive medical services, it will be impossible to arrange mass events, specifically when it involves protest action. The imposition of compulsory risk assessments can create unnecessary bureaucratic requirements which can discourage groups and individuals from enjoying their freedom of peaceful assembly.[252] Regulation 14 of the Emergency Care at Mass Gathering Events Regulations provides that a person who contravenes any of the regulations is liable on conviction to a fine or imprisonment for a period not exceeding five years, or both a fine and such imprisonment. The substantial sentence can discourage organisers and participants to arrange and proceed with mass gatherings.

4.6.2 Disaster Management Act

Section 6(6)(a) of the Gatherings Act provides that when the responsible officer, the Minister for Safety and Security, or a court on application in terms of the common law, has prohibited a gathering, or if a magistrate or court has upheld the prohibition of a gathering, the authorised member (police member) must prevent the gathering from taking place. However, during the Covid-19 pandemic, the Minister of Cooperative

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247 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 paras [89], [155].

248 *Govsha v Belarus* para 1.1. See Chapter 2 above.

249 E.g., they did not provide receipts confirming that services relating to the protection of public order and security, medical facilities and cleaning at the end of the meeting had been paid. Sections 5 and 6 of the Law on Mass Events contain various requirements, such as measures for securing public order and safety at a mass event, measures connected with medical services and cleaning after an event, and so on.

250 *Poliakov v Belarus* para [2.1].

251 *Poliakov v Belarus* para [3.1].

252 *Poliakov v Belarus* para [119]. See also Chapter 2 above.

Governance and Traditional Affairs, designated under the Disaster Management Act 57 of 2002, declared a national state of disaster.[253] The Disaster Management Regulations[254] provides for serious inroads into the right to gather as protected by section 17 of the Constitution. A 'gathering' in the Disaster Management Regulations means:

> …any assembly, concourse or procession in or on –
>
> *(a)* any public road, as defined in the National Road Traffic Act, 1996 (Act No. 93 of 1996); or
>
> *(b)* any other building, place or premises, including wholly or partly in the open air, and including, but not limited to, any premises or place used for any sporting, entertainment, funeral, recreational, religious, or cultural purposes.[255]

The Disaster Management Regulations prohibit any kind of gathering with the exception of a funeral or cremation, which is limited to 50 persons including the employees of the funeral parlour.[256] The police must order persons who are gathering to disperse immediately, and, on refusal, they may arrest and detain these participants.[257] A person who convenes a gathering,[258] or hinders, interferes with, or obstructs the police in the exercise their powers and duties in terms of these Regulations, is liable to a fine or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.[259]

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253 Regulation 1 of the Disaster Management Act – a "national state of disaster" means "the national state of disaster declared by *GN* R. 313 of 15 March 2020".

254 Consolidated regulations published in *GN* 318 dated 18 March 2020, as amended by *GN* R. 398 dated 25 March 2020, R. 419 dated 26 March 2020, R. 446 dated 2 April 2020 and R. 465 dated 16 April 2020.

255 Regulation 1 of the Disaster Management Act. The Disaster Management Regulations provides for different levels of restriction during the pandemic.

256 Regulation 3(1) of the Disaster Management Act read with regulation 11B(8). Even though funerals are allowed under level 3 Covid-19 lockdown regulations, many such gatherings contravene the 50-person maximum. See, e.g. Bhengu L "Police fire rubber bullets, stun grenades to disperse 250-strong church service in Sebokeng" https://www.news24.com/news24/SouthAfrica/News/police-fire-rubber-bullets-stun-grenades-to-disperse-250-strong-church-service-in-sebokeng-20210110 (Date of use: 11 January 2021); Pheto B "Cop assaulted after breaking up illegal 'after tears' party in Joburg" https://www.timeslive.co.za/news/south-africa/2021-01-14-cop-assaulted-after-breaking-up-illegal-after-tears-party-in-joburg/ (Date of use: 16 January 2021).

257 Regulation 3(2) of the Disaster Management Act.

258 Regulation 11(1)(a) of the Disaster Management Act.

259 Regulation 11(1)(c) of the Disaster Management Act.

4.7 Conclusion

As discussed in this chapter, the purpose of the Gatherings Act is to regulate the holding of peaceful public gatherings and demonstrations. The Act also provides for offences when the provisions of the Act are not adhered to. Although the Act commenced in 1996 and is approximately 25 years in operation, very few prosecutions have been instituted under the provisions of the Act. Any indication of court records for several of the offences under the Act, for example, failure by an organiser or marshal to adhere to their duties, or failure to inform the responsible officer that a gathering is cancelled, could not be found.

Protest action is the only way the poor and unrepresented can bring their causes under the attention of the authorities, and the Gatherings Act must assist everyone to do so. The first point of reference when a member of the public considers to organise a gathering, is the Act itself. The Act prescribes the steps an organiser needs to take to arrange gatherings and demonstrations. However, the language used in the Gatherings Act can be seen as difficult to understand, confusing and not user-friendly. The use of words, for example, ‘responsible officer’ and ‘authorised member’ create confusion. To identify the place of notification may require substantial effort. To establish what the offences in the Act entail can be difficult without the assistance of a legal representative. Although the Act provides for notification, the procedure can easily be mistaken for permission required to be obtained from the local authority, and this confusion may, therefore, be abused by local authorities.

The provisions providing for the failure to notify the local authority of an intended gathering was declared unconstitutional although the notification procedure is still in place. It is also not an offence to participate in a gathering where no notification was given to the local authority. These decision renders an already limping Act mainly ineffective to provide in its purpose. Quite a few of the offences are linked to the notice procedure. If the organiser fails to notify the responsible officer (local authority) of an intended gathering, there is no risk that conditions can be imposed on the gathering, or that the gathering can be prohibited.

It is evident that the provisions of the Gatherings Act must be reconsidered since they seem to be not functional or relevant in today’s context. To protest is inherent to the

people of South Africa, and the Act regulating the gathering of persons must be supportive, easily readable and understandable. Most of the Gatherings Act will possibly not withstand constitutional muster. It is foreseen that the contents of the notice, time-frame prescriptions, the difference between demonstrations and gatherings, and the involvement of the local government, may be contended in court as limiting the right to gather as guaranteed in section 17 of the Constitution.

In the following chapter, the common-law offence of public violence will be investigated as to its efficiency in regulating violent gatherings.

CHAPTER FIVE

PUBLIC VIOLENCE

5.1 Introduction

The common-law offence of public violence is essentially utilised by the state in cases of violent gatherings, dissent, mass-action, protest, or faction fighting. The application of this offence is extensive. A wide range of acts, depending on the circumstances, resort under the definition, for example, the offence is applicable to the landless poor trespassing, gangs clashing, communities burning property, employees picketing, a private party turning violent, or soccer hooligans fighting. The offence does not differentiate between violence involved in land invasion, violence at sport events, violence against the state, or domestic quarrels, as long as the conduct "assume serious dimensions and is intended forcibly to disturb public peace and tranquillity or to invade the rights of others".[1] The offence of public violence is primarily the only crime to prosecute the violent conduct of a group of people in South Africa.

Be that as it may, not all violent conduct qualifies as crimes of public violence. In this regard, guidelines created by international and regional instruments aid governments to comply with international legal norms and standards as regards regulating violent gatherings.[2] These guidelines assist with the interpretation of legislation governing the right to gather and the use of violence. The ECtHR states that only gatherings where the organisers and participants intend to use violence qualify for prosecution.[3] Furthermore, the range of conduct that constitutes violence should be narrowly interpreted but "may extend beyond physical violence to include inhuman or degrading treatment or intentional intimidation or harassment."[4] According to the *Guidelines on freedom of association and assembly in Africa*, isolated acts of violence do not render

1 Snyman *Snyman's criminal law* 277.

2 See Chapter 2 above. Although it is guidelines, its basis is in case law.

3 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [46]; *Cisse v France* (Application no 51346/99 9 April 2002) para [37]. South African courts may take cognisance of the decisions of the ECtHR when adjudicating cases that stem from the right to gather, since the Constitution provides that, for the purpose of interpretation, international instruments are applicable.

4 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [55].

a gathering as a whole unpeaceful.[5] Any peaceful gathering, however, has the potential to become violent. Service delivery protest is especially marred by violence which includes, amongst other misdeeds, serious damage to infrastructure. Police action during gatherings may also escalate violent conduct by participants, raising the question if the police are properly trained to decide when conduct renders a gathering violent.

This chapter focuses on the difficulty experienced by the general public to predict when the offence of public violence is committed, since the answer seemingly depends on the decision of the presiding officer after considering the facts of each case. It is important that the public are informed in advance as to what conduct is unacceptable and criminally sanctioned. It is argued that it is uncertain when conduct will be deemed serious enough to result in a guilty-finding. Furthermore, the forum and the discretion of the presiding officer play a role with regard to the punishment imposed.

Reference is made to legislation in other countries; i.e. England, and India, who have deviated from the one-offence-fits-all-conduct-approach, and enacted specific public order legislation to cater for particular problems with reasonable sentences. These countries enacted various offences ranging from serious to less serious conduct with applicable sentences. The question is investigated whether South Africa should also follow this approach as regard violent gatherings.

5.2 The definition and elements of public violence

In order to examine the manner in which the offence of public violence has developed in selected foreign countries as specified above, it becomes necessary to explore the definition and elements of the crime as located in South African criminal law. This will be effected in the following paragraphs.

5.2.1 The definition of public violence

According to Snyman:

> Public violence consists of the unlawful and intentional commission, together with a number of people, of an act or acts which assume serious dimensions and which

[5] ACHPR *Guidelines on freedom of association and assembly in Africa* para [70].

are intended forcibly to disturb public peace and tranquillity or to invade the rights of others.[6]

The elements of the offence are an act (on private or public property), by a number of people (the number will depend on the circumstances), which assumes serious proportions (contingent on different factors), is unlawful and intentional, disturbing the public peace and order by violent means, or infringing the rights of others.[7] The elements of this offence are interlinked, however, the evidence on some of the elements must be considered to prove another. For the purposes of this chapter, the elements of culpability and unlawfulness are not discussed.[8]

The offence does not describe specific acts – any conduct which takes on serious proportions, and where the intent is to disrupt the public's peace and quiet by force, or where another person's rights are violated are criminalised. These elements will consequently be discussed.

5.2.2 The elements of public violence

In the following paragraphs, four elements of public violence will be analysed by making use of applicable case law, legislation, and international and regional guidelines.

5.2.2.1 A number of people acting in concert

Public violence must be committed by a number of persons acting in concert. The number is not prescribed, and will depend upon the circumstances of each case.[9] A single person, however, cannot commit public violence.

To establish the exact number of people deemed sufficient to commit the offence is problematic. In the past, different courts made dissimilar rulings on the number of persons required to constitute public violence. For example, in *R v Nxumalo and*

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6 Snyman *Snyman's criminal law* 277. In Milton *South African Law and Procedure* 74, public violence is defined as consisting in the unlawful and intentional commission, by a number of people acting in concert, of acts of sufficiently serious dimensions which are intended violently to disturb the peace or security or to invade the rights of others. See *S v Le Roux and Others* 2010 (2) SACR 11 (SCA).

7 Snyman *Snyman's criminal law* 277. See also *ER v Cele and Others* 1958 (1) SA 144 (N); *R v Claassens and Another* 1959 (3) SA 292 (T); Burchell and Milton *Principles of Criminal law* 610.

8 See Snyman *Snyman's criminal law* Chapters IV and V for a discussion.

9 Snyman *Snyman's criminal law* 278.

Others,[10] five appellants had been convicted of public violence in relation to a quarrel in which only they and five others had been involved, and which lasted two minutes.[11] The court of appeal was doubtful whether it could be said that ten persons constituted a considerable number of persons.[12] The court found that although the actions of the five accused were forceful, the incident did not last long, and, thus, the offence of public violence was not proven.[13] In *R v Salie*,[14] the court held that in faction-fight cases the following need to be considered: the extent of the quarrel, the number of persons engaged, the locality, the duration of the fight, the way in which the fight was ended, the cause of the quarrel, and the status of the persons engaged in it.[15] Eight persons fighting were not considered sufficient to constitute public violence. In *Mcunu v R*,[16] the conduct of six persons was not sufficient to commit the offence of public violence, whereas in *R v Terblanche*,[17] five persons were considered adequate. Where, in *R v Nxumalo*,[18] five to ten persons armed with sticks and irons assaulted passengers on a train, the court nonetheless believed that the offence of public violence was not committed.

The examples of case law mentioned above indicates that the police and prosecution sometimes misread the elements required to prove the offence of public violence.[19] It is submitted that a member of the public will struggle to establish when the number of persons will be deemed sufficient to commit this offence. It seems that in order to ascertain whether the offence was actually committed depends on the discretion of the presiding officer, after consideration of all the facts.

The definition does not require that the exact number of persons be known – the state only needs to corroborate that a group of people was present. It will depend on the circumstances of each case whether the group of persons is deemed sufficient to commit the offence, therefore, it is possible that two or three persons are sufficient to

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10 *R v Nxumalo and Others* 1960 (2) SA 442 (T) (hereinafter *Nxumalo*).
11 *Nxumalo* 442.
12 *Nxumalo* 442-443. The court took into consideration the dimensions of the quarrel, the number of persons involved, the locality, the duration of the fight, and the cause of the quarrel.
13 *Nxumalo* 444.
14 *R v Salie* 1938 TPD 1362.
15 *R v Salie* 1938 TPD 1362.
16 *Mcunu v R* 1938 NPD 226.
17 *R v Terblanche* 1938 EDL 112.
18 *R v Nxumalo* 1960 (2) SA 442 (T).
19 By misinterpreting the number of persons needed to commit the offence or if the conduct assumes serious proportions.

commit the offence.

It is essential that the state also shows evidence that the group acted in concert. If only one person acts violently in a group of a hundred, it is debatable whether the offence is committed. For example, in *S v Mei*,[20] between fifteen and thirty people assembled at a place where the road had been blocked by stones. The appellant threw a stone at a police vehicle, and was arrested.[21] The court found that the mere placing of stones in the road did not amount to public violence, but throwing stones at vehicles may satisfy the requirement of violence.[22] The court concluded that it is difficult to associate the appellant's behaviour with the group unless it is found that the group of people present at the scene had as their objective the throwing of stones at vehicles. In this case, the element of the offence which requires that a number of people must act in concert to commit public violence was absent.[23]

On the other hand, in *S v Safatsa*,[24] the court stated that it was not necessary to establish that the accused themselves threw stones, since the evidence corroborated clearly that the accused were in the forefront of the stone-throwing mob, thus actively associating themselves with the common purpose to commit riotous and violent disturbance of the public peace. In *S v Mgedezi*,[25] groups of men armed with home-made weaponry entered parts of a compound, chanting songs of the imminent execution of the team leaders. They then attacked the room shared by six team leaders, hacked the door down, and set it alight. During the attack, four team leaders died.[26] None of the state witnesses saw the accused physically hurting the team leaders. In this case, the court found that it had a duty to consider the evidence against each accused separately and individually, in determining whether there was a sufficient basis for holding each of the participants liable.[27]

To establish whether the number of people acted in concert may be challenging. Unorganised, seemingly leaderless, violent gatherings sometimes give the police no other option than to arrest participants to eliminate injury to persons and damage to

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20 *S v Mei* 1982 (1) SA 299 (O) (hereinafter *Mei*).
21 *Mei* 299.
22 *Mei* 302.
23 *Mei* 302.
24 *S v Safatsa* 1988(1) SA 868 (A) 903E.
25 *S v Mgedezi* 1989 (1) SA 687 (A) (hereinafter *Mgedezi*).
26 *Mgedezi* 688.
27 *Mgedezi* 689.

property. When the police get involved, participants may scatter in all directions. To identify individuals, and be able to testify what part they played in the gathering, is problematic. Popular defences are, for example, that the accused were only passing by, watching (as spectators), on their way home, compelled, intimidated, or assaulted to attend the gathering. Community members and schoolchildren often allege that they were taken out of their houses or schools, threatened and bullied into joining protest action. In *ER v Samuel and Others*,[28] the defence of the accused was that he had been forced by the gang to join the gathering. However, the court held that when the police arrived on the scene, the duress ceased, and, therefore, any justification for adherence to the gang.[29] The state needs to prove that the accused actively associated with the conduct of the crowd,[30] and acted in concert, that is, in common purpose with the group.[31]

Due to the number of accused in public violence cases, the finalisation of cases are slow. Cases can repeatedly be postponed for all the accused and their legal representatives to attend court. Court attendances of a high number of accused in public violence matters are regularly accompanied by further protest action outside courts, and the handing over of petitions by community leaders. All these factors may impede the progress of a public violence case.

5.2.2.2 An act must assume serious proportions

To decide whether conduct assumes serious proportions, courts need to consider the facts of each case individually, taking into account relevant factors, which can include: the number of persons, the time, the place, the reason, status of persons involved, damage to property, injuries, loss of life, weapons involved, planning, intimidation, common-purpose, how the participants responded to police action, the nature of the violence, the impact on the public, and how the violence ended.[32] In the past, courts made various rulings with regard to when conduct assumes serious proportions. In *S v Mlotshwa and Others*,[33] an employee of a company drove her car to the company's

28 *ER v Samuel and Others* 1960 (4) SA 702 (SR).
29 *ER v Samuel and Others* 1960 (4) SA 702 (SR).
30 See Dlamini 2002 *SACJ* 1-22.
31 Snyman *Snyman's criminal law* 278.
32 Snyman *Snyman's criminal law* 279.
33 *S v Mlotshwa and Others* 1989 (4) SA 787 (W) (hereinafter *Mlotshwa*).

warehouse, and found the main gates closed.[34] When she stopped in front of the gate, a group of approximately twelve to twenty persons stormed her vehicle. Some members of the group hit the vehicle, screamed, and attempted to open the doors. The vehicle was completely surrounded, and her door opened. The gates opened, and she drove into the premises. The incident lasted approximately six seconds, and no damage was done to the vehicle. The court decided that the confrontation did not contain all the elements of public violence.[35] The incident lasted a mere six to seven seconds; the participants were unarmed, and the violence was restricted to a threat of violence, accordingly, no harm was done. The court found that it would be an unwarranted extension of the offence of public violence since the acts were not of sufficiently serious dimensions – the episode was of an extremely short duration. The court also considered that the accused were on a lawful strike.[36]

A similar conclusion was reached in *R v Ngubane and Others.*[37] In this case, sixteen persons attended a wedding celebration at a kraal, armed with shields, sticks and knob sticks. When a constable attempted to arrest one of them, he was assaulted by the group. The court found that due to the restricted nature of the quarrel, the private nature of the locality, the limited duration of the occurrence, and the limited number of persons concerned, that the incident did not amount to an act of public violence.[38] However, in *S v Usayi and Others*,[39] a group of about twelve of the Usayi family entered the Masango's land. A number of them were armed with axes, spears and sticks. Fences were demolished, and fire set to fencing material and grass. One person was assaulted.[40] The court held that:

> …it involved a family dispute and the trouble was confined to private property, that the families were large - more like clans - and the violence occurred very much in the open and on some scale; it was likely and must have been known to be likely to cause retaliation from the other clan, with quite possibly serious consequences, even though it might not have disturbed other members of the public; the action was premeditated, the appellants were armed, and they openly and publicly invaded the property and rights of others.[41]

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34 *Mlotshwa* 794.
35 *Mlotshwa* 795.
36 *Mlotshwa* 795.
37 *R v Ngubane and Others* 1947 (3) SA 217 (N) (hereinafter *Ngubane*).
38 *Ngubane* 217.
39 *S v Usayi and Others* 1981 (2) SA 630 (ZA) (hereinafter *Usayi*).
40 *Usayi* 631.
41 *Usayi* 631.

The court found that their conduct constituted public violence. Similarly, in *R v Xybele and Others*,[42] rival groups marched in gangs for six days, bearing weapons and battle headdress, to exhibit a show of strength. The court decided that any reasonable person would be of opinion that these acts would likely cause fights, assaults, fear and disturbances among the citizens, therefore constituting public violence.[43] In *S v Le Roux and Others*,[44] seven appellants were convicted of public violence.[45] The convictions arose from an incident at a restaurant in which the appellants were found to have assaulted customers, and damaged property. The incident was rowdy and confrontational in which windows, goods and furniture had been broken.[46] The appellants argued that the incident had not been of such a magnitude as to amount to public violence, and that the state failed to adduce evidence linking them to any act committed on the day in question. The court stated that the prominent features of the offence of public violence were that a group of persons, acting in concert, had committed an act of sufficiently serious dimensions which invaded the rights of others and disturbed public peace.[47] The court found that it was necessary to consider all the evidence in order to determine the involvement of the appellants[48] and referred to *Mgedezi*[49] where the court dealt with a situation where there was no prior plan to commit the offence of public violence.[50] The court concluded that:

> …a general and all-embracing approach regarding all those charged is not permissible, and that the conduct of the individual accused should be individually considered, with a view to determining whether there is a sufficient basis for holding that a particular accused person is liable, on the ground of active participation in the achievement of a common purpose that developed at the scene.[51]

In *S v Thonga*,[52] the accused, who lived in a rural area where people still believe in witchcraft, was convicted of public violence on the basis of his participation in a rampage by an unruly mob of mostly young people aimed at attacking people accused of being witches and wizards. The acts continued for a period of approximately two

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42 *R v Xybele and Others* 1958 (1) SA 157 (T).
43 *R v Xybele and Others* 1958 (1) SA 157 (T) 157.
44 *S v Le Roux and Others* 2010 (2) SACR 11 (SCA) (hereinafter *Le Roux*).
45 *Le Roux* para [12].
46 *Le Roux* para [17].
47 *Le Roux* paras [16]-[18].
48 *Le Roux* para [13].
49 *Le Roux* para [17] referring to *Mgedezi* paras [703B], [703I].
50 *Le Roux* para [19].
51 *Le Roux* para [19].
52 *S v Thonga* 1993 (1) SACR 365 (V) (hereinafter *Thonga*).

months. The accused, together with others, visited a number of kraals where they assaulted persons suspected of being involved in witchcraft, one person was killed and others injured.[53] It is, therefore, difficult to predict beforehand whether certain conduct assumes serious proportions, since it depends on how the presiding officer will interpret the particular facts. As a result, it is challenging for an ordinary member of the public to foresee, to a degree that is reasonable in the circumstances, the consequences of certain conduct.

In South Africa, depending on the seriousness of the conduct and factors including time, locality, duration, damage, or violence, the forum where the case can be heard varies – the case may be heard in the district, regional or high court. According to the Policy Directives issued by the National Director of Public Prosecutions (NDPP),[54] all cases must be tried in the regional court where personal injuries were inflicted. It follows that where no injuries were inflicted, cases can be heard in the district court. According to the Policy Directives issued by the Director of Public Prosecutions (DPP): Mpumalanga,[55] all cases must be tried in the regional court, except where the senior prosecutor is of the view that the public violence committed was not of a severe nature. The question can conversely be posed – if it is deemed that the conduct was not of a severe nature – does this conduct constitute public violence as it does not assume serious proportions?

As regards punishment, the district court may impose a sentence of imprisonment for a maximum of three years. Section 51 of the Criminal Law Amendment Act 105 of 1997 provides for discretionary minimum sentences for certain serious offences. Public violence falls under Part IV of Schedule 2, which determines that an offender must be sentenced if he or she had with him or her a firearm intended to be used in the commission of the public violence; to a minimum sentence in the case of a first offender to imprisonment for a period not less than five years; a second offender to imprisonment for a period not less than seven years; and a third or subsequent offender to imprisonment for a period not less than ten years. It is, therefore, important

53 *Thonga* 366.

54 Part 11: Matters justiciable in regional court. *Prosecution Policy Directives*. Policy Directives issued by the NDPP as revised on 1 May 2019, read with the Policy directives issued by the DPP for the province Mpumalanga dated 1 November 2019.

55 Part 11: Matters justiciable in regional court. *Prosecution Policy Directives*. Policy Directives issued by the NDPP as revised on 1 May 2019, read with the Policy directives issued by the DPP for the province Mpumalanga dated 1 November 2019.

that the senior prosecutor must properly consider the facts in each case. Specific guidelines are currently not available to assist senior prosecutors with the meaning of 'not of a severe nature', therefore, the decision may differ from prosecutor to prosecutor. Due to the variance in possible sentences in the high, regional and district courts, the decision on the applicable forum will be of most importance to the accused.

5.2.2.3 Forcibly disturbing peace and tranquillity

The interest that the state attempts to protect with the offence of public violence is public peace and tranquillity, which is generally violated during protest action or when groups of people attack others. According to the *Guidelines on freedom of peaceful assembly*:

> The term 'peaceful' includes conduct that may annoy or give offence to individuals or groups opposed to the ideas or claims that the assembly is seeking to promote. It also includes conduct that temporarily hinders, impedes or obstructs the activities of third parties ... As such, an assembly can be entirely 'peaceful' even if it is 'unlawful' under domestic law.[56]

The *General comment* published by the UN Human Rights Committee provides that:

> Isolated instances of such conduct will not suffice to taint an entire assembly as non-peaceful, but where this is manifestly widespread within the assembly, participation in the gathering as such is no longer protected under article 21.[57]

It therefore implies that the facts of each case will indicate whether the peace and tranquillity were affected. There must furthermore be a common purpose amongst the participants to forcefully disturb the public peace and tranquillity.[58] The offence can be committed even if there is no actual disturbance of public peace and security, so long as the conduct is intended to disturb the peace or invade rights of others.[59] Consequently, it is not sufficient if only one of the participants has the required intention.

According to Snyman, public violence must be accompanied by violence or threats of violence.[60] It seems, therefore, that the reference in the definition to disturb the public peace and tranquillity by force, or to offend the rights of others implies that the conduct

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56 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [19].
57 ICCPR *General Comment* para [19].
58 *R v Kashion* 1963 (1) SA 732 (SR) 727.
59 Snyman *Snyman's criminal law* 279.
60 Snyman *Snyman's criminal law* 279.

must take place by means of violence or threats of violence. The definition provided by Milton also stipulates that "conduct must be intended violently to disturb the peace or security".[61] Khumalo is of opinion that reference must be made to the offence of assault, since it sets out how the concepts of force and violence can be interpreted for purposes of all offences of violence, *inter alia*, public violence:

> Under assault jurisprudence, the violence required to constitute an assault exists where there is a direct or indirect unlawful application of force (in whatever degree) against the body of another. A threat of violence exists where the victim apprehends the immediate application of force against his/her body. Therefore, it is clear that for the offence of assault, force is a feature of violence and that there is no distinction between these concepts. Furthermore, any degree of force (be it slight or extreme) is sufficient to constitute violence… the force needed to constitute the violence required for public violence, regardless of whether such force is slight or extreme, still has to satisfy the element of 'serious dimensions' before such force could be deemed to amount to public violence.[62]

Khumalo thus interprets force as part of violence. Violence usually includes forceful conduct, especially when participants of public violence want to bring their cause to the attention of the government, or want to achieve a specific objective. It is submitted that members of the public may find it challenging to understand the concept of 'forcibly disturbing public peace', and the extent of force required to commit the offence.

When monitoring gatherings, the police must be vigilant not to induce violence when facilitating a peaceful assembly, or not to arrest all the participants when only some of the participants display violent behaviour. The conduct of the participants in retaliation against police conduct at a gathering frequently are forceful and of sufficient serious dimensions to amount to public violence. Therefore, the police must be properly trained to identify violent conduct and to facilitate gatherings. The *Guidelines on freedom of peaceful assembly* also alert governments to the following:

> It is vital to note, however, that the presence of certain socio-economic or political factors does not of itself make violence at public assemblies inevitable. Indeed, violence can often be averted by the skilful intervention of law enforcement officials, municipal authorities and other stakeholders such as monitors and stewards. Measures taken to implement freedom of assembly legislation should therefore neither unduly impinge on the rights and freedoms of participants or other third parties, nor further aggravate already tense situations by being unnecessarily

61 Milton *South African Criminal law and procedure*: *Common law crimes* 74.
62 Khumalo 2016 *SACJ* 44-52.

> confrontational.[63] Law enforcement officials should differentiate between peaceful and non-peaceful participants: Neither isolated incidents of sporadic violence, nor the violent acts of some participants in the course of a demonstration, are themselves sufficient grounds to impose sweeping restrictions on peaceful participants in an assembly… Law enforcement officials should not therefore treat a crowd as homogenous if detaining participants or (as a last resort) forcefully dispersing an assembly.[64]

A decision to institute prosecution can consequently only be taken after careful consideration of the conduct of all the participants on the scene.

5.2.2.4 Private or public place

It does not matter whether the conduct by a number of people was committed in a public or private place, in a building, or in the open air when prosecution is instituted under the common law offence of public violence. Although public violence can take place in a private place, it still needs to disturb the public peace and tranquillity.

5.3 The South African public violence offence and international guidelines

A member of the public may struggle, without legal advice, to establish when the common-law offence of public violence is committed. Many of the elements of the offence of public violence are open for interpretation, and can easily be misunderstood by participants and police members.[65] As stated above, to ascertain if the offence was committed is only clarified at the end of a trial, depending on the discretion of the presiding officer, after consideration of all the facts. According to the *Guidelines on the freedom of peaceful assembly*, an offence must be:

> …accessible to the persons concerned and formulated with sufficiently precision to enable them to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[66]

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63 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [142]. See European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2019 para [176].

64 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [159].

65 See paras 5.2.2.1-5.2.2.4 above; Khumalo 2017 *SACJ* 23.

66 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [98].

These guidelines are based in case law. Furthermore, the rule of law demands legal stability and predictability.[67] Clear definitions are vital to ensure that an offence is understandable. The South African government must for that reason clearly outline the responsibilities and duties of all the role-players, and ensure public awareness with regard to applicable law.[68]

The *Kudrevičius and Others v Lithuania*-case[69] is an ECtHR example where the applicants, after being convicted of rioting, appealed to an international human rights instrument. Their complaint was that the elements of the offence riot was not clearly defined, and could, therefore, not be legitimately regarded. The arguments in this case are also applicable to the offence of public violence, since it is argued that the offence is not clearly defined. The facts of this case entail that a group of farmers blocked and demonstrated on three major highways for approximately 48 hours.[70] Criminal proceedings against the farmers (applicants) were instituted under Article 283 section 1 of the Criminal Code which establishes criminal liability for rioting – a public order offence – which provides as follows:

> A person who organises or provokes a gathering of people to commit public acts of violence, damage property or otherwise seriously breach public order, or a person who, during a riot, commits acts of violence, damages property or otherwise seriously breaches public order, is liable to be sentenced to a short-term custodial sentence (*baudžiamasis areštas*) or to imprisonment for up to five years.[71]

The farmers *inter alia* raised the arguments that the notion of 'serious breach of public order' was not clearly defined, and thus could not legitimately be regarded as a feature characterising the criminal offence.[72] The farmers submitted that the provisions were not clearly formulated, not properly interpreted by the domestic courts, and, therefore, the conviction was of an excessive measure.[73] The farmers further argued that the government's deliberate delay and refusal to assist with the farmers' problems created a critical situation. The farmers contended that the government's indecision had significantly impoverished rural areas; therefore, the conduct for which they had been

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67 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [96].
68 ICCPR *General Comment* para [28].
69 *Kudrevičius and Others v Lithuania* para [1]. For a more detailed case discussion, see para 2.4.3.2 above.
70 *Kudrevičius and Others v Lithuania* para [20].
71 *Kudrevičius and Others v Lithuania* para [81].
72 *Kudrevičius and Others v Lithuania* para [103].
73 *Kudrevičius and Others v Lithuania* para [103].

convicted was deprived of the "objective and subjective elements of criminal liability".[74] The decision to stage roadblocks had been a last resort in order to defend their interests.[75] Their intention was not to breach public order, but to peacefully demonstrate for social justice.[76] The applicants claimed that the criminal proceedings against them had been disproportionate, and an unnecessary measure.[77] Notwithstanding the farmer's arguments, it is submitted that Article 283 section 1 of the Criminal Code which establishes criminal liability for rioting is more clearly outlined than the South African common-law offence of public violence.[78]

Many of the elements of the definition of the common-law offence of public violence in South Africa are open for interpretation, since it is not clearly defined and formulated.[79] It is argued that conduct criminalised by this offence can include any conduct,[80] for example, tribal fights,[81] student protests,[82] service delivery protests, strikers violently intimidating others,[83] disturbing meetings,[84] throwing of stones, trespassing on property, gang-related fights, private quarrels, organised crime, destroying infrastructure,[85] or sport-related violence.[86] The number of persons needed to commit the offence varies from case to case,[87] sometimes three people are sufficient, while ten or more people can be inadequate. The meaning of 'intended forcibly' is unclear – raising questions with regard to passive resistance, and when the force or violence will be sufficient to constitute the offence.[88]

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74 *Kudrevičius and Others v Lithuania* para [119].
75 *Kudrevičius and Others v Lithuania* para [120].
76 *Kudrevičius and Others v Lithuania* para [122].
77 *Kudrevičius and Others v Lithuania* para [124]. At the end, the court found that the Lithuanian authorities struck a fair balance between the legitimate aims of the "prevention of disorder [and of the] protection of the rights and freedoms of others" on the one hand, and the requirements of freedom of assembly on the other, see para [182].
78 It provides that a person who organises or provokes people to commit public acts of violence or damage property or seriously breach public order, or a person who, during a riot, commits such acts is guilty of an offence.
79 Burchell 2019 *Acta Juridica* 206 warns that it is not a simple issue to develop law in order to meet changing circumstances and attitudes.
80 See para 5.1 above.
81 *Ngubane* 217, *R v Xybele* 1958 (1) SA 157 (T).
82 E.g., the #FeesMustFall movement. See footnote 82 in Chapter 3 above.
83 *Cele* 1958 (1) SA 144 (N).
84 *Claassens* 1959 (3) SA 292 (T).
85 The Criminal Matters Amendment Act 18 of 2015 provides for substantial sentences when essential infrastructure is damaged or destroyed.
86 See Chapter 3 above; Oloka-Onyango *When courts do politics: Public interest law and litigation in East Africa* 76-111.
87 See para 5.2.2.1 above.
88 See para 5.2.2.3 above.

The average citizen will have much difficulty in figuring out when conduct assumes serious proportions,[89] when exactly the public peace and order is disturbed, or when the rights of others are infringed. It is, therefore, uncertain which behaviour is criminalised and when precisely it becomes unlawful. The extent of the sentence that can be imposed by the courts is furthermore difficult to foresee.[90]

Most service delivery protests in South Africa take place against the government's refusal or inaction to assist communities in impoverished areas. In these participants' opinion, the violence (protest and burning of buildings and infrastructure) are their last resort in order to draw the attention of the government to their plight. Marks[91] summarises the situation in South Africa as follows:

> Police responsible for public order policing find themselves in the middle of complex situations which they are unable to resolve, and it would appear that government at all levels is not taking adequate responsibility for the conditions that have led to this current climate…[92] Local government, and other key components of government have turned into instruments for the enrichment of the politically connected rather than prioritising the interests of the people as a whole. Government institutions that are being used as an instrument for enrichment and operate around patronage networks are not capable of responding to the demands of protestors. Peaceful protest did not present too much of a problem to local or other political elites and were largely ignored. But ignoring peaceful protests inevitably translated into an escalation of more violent protest, essentially a symptom of systems of local power that functioned in an exclusionary manner.[93]

Therefore, a conviction of public violence in these circumstances may be seen as deprived of the objective and subjective elements of criminal liability, or disproportionate and an unnecessary measure. However, an application on this ground will not succeed if the participants had at their disposal alternative and lawful means to bring their complaints to the attention of the government.[94]

89 See para 5.2.2.2 above.
90 See para 5.2.2.2 above.
91 Marks 2014 *SACJ* 346.
92 Marks 2014 *SACJ* 373.
93 Marks 2014 *SACJ* 371-372.
94 Marks 2014 *SACJ* 371-372.

5.4 Other South African legislation criminalising serious violent conduct by a number of people

In addition to the common-law offence of public violence providing that conduct must 'assume serious proportions', other legislation also provides for situations where serious violent conduct is deemed unlawful. The Prevention of Organised Crime Act 121 of 1998 and the Criminal Matters Amendment Act 18 of 2015 may also be applicable when violent gatherings take place. The Safety at Sports and Recreational Events Act 2 of 2010 regulates safety at events where spectators usually pay an entrance fee. Charges under these Acts can be added to the charge of public violence.

For the purpose of this chapter, reference is made to abovementioned Acts. It must, however, be kept in mind that depending on the circumstances, several other offences may be committed during public violence, for example, assault, malicious damage to property, arson, murder, or even sexual assault. Public violence is also a competent verdict on a charge of murder, attempted murder,[95] and culpable homicide.[96] A precise separation of offences is not always possible.[97] If the acts of a number of people challenge the authority of the state, sedition is committed, and if the act is accompanied by hostile intent, then high treason may be committed.[98]

5.4.1 Gang-related offences

Gang-related offences are deemed to be serious, and include violent conduct by a number of people. The Prevention of Organised Crime Act provides for offences committed by gangs. When a gang commits public violence, the offences under the Prevention of Organised Crimes Act apply. However, the gang needs to meet the specific requirements in the definition of a criminal gang. The requirements include:

> …any formal or informal on-going organisation, association or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol and whose members individually or collectively engage in or have engaged in a pattern

95 Section 258 of the Criminal Procedure Act 51 of 1977. In *S v Whitehead and Others* 2008 (1) SACR 431 (SCA), the court found that a conviction on charges of public violence and culpable homicide did not constitute a duplication of convictions.
96 CPA s 259.
97 Snyman *Snyman's criminal law* 278.
98 Snyman *Snyman's criminal law* 278.

of criminal gang activity.[99]

A court can, in considering whether a person is a member of a criminal gang, take certain factors in consideration. For example, that the person admits to criminal gang membership; is identified as a member of a criminal gang by a parent or guardian; resides in a particular criminal gang's area; adopts a style of dress, uses hand signs, language, or has tattoos associated with a gang.[100] The Act is applicable to more structured gangs having a name, dress code, and its roots in criminal activity. Due to the requirements of the Act, it is difficult to prove these offences except in areas of notorious gang activities. In many cases, boys of school-going age, staying in a specific area, are part of informal gangs with a specific name but no identifiable activity. They gather at night, drinking and partying – and attack other groups or individuals foreign to the area as a loose-knitted group. In these instances, the Prevention of Organised Crime Act is difficult to apply, and the prosecution usually proceeds on a charge of public violence.

5.4.2 Essential infrastructure offences

Service delivery protests regularly include the destruction of infrastructure since it is seen to be the only way to attract the attention of the government. The damaging of municipal buildings, hospitals, trains, buses, trucks, and roads are part and parcel of the offence of public violence.[101] The Criminal Matters Amendment Act creates offences relating to essential infrastructure[102] which are necessary to deter the high occurrence of damage to these properties. Any interference with essential infrastructure poses a risk to public safety, electricity supply, communications and

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99 Prevention of Organised Crime Act s 1 – A 'pattern of criminal gang activity' means "any person who actively participates or is a member of a criminal gang and wilfully aids any criminal activity committed for the benefit of the gang or threatens to commit any act of violence or any criminal activity by a criminal gang or threatens any person with retaliation in response to any act or alleged act of violence, is guilty of an offence. Any person who performs any act which is aimed at causing or promoting towards a pattern of criminal gang activity; or encourages any other person to commit or participate in a pattern of criminal gang activity; or to join a criminal gang is guilty of any offence."

100 Prevention of Organised Crime Act s 11.

101 See Chapter 6 below.

102 Criminal Matters Amendment Act s 1. 'Essential infrastructure' includes: "any public or privately-owned installation, structure, facility or system, when lost, damage or tampering with, may interfere with the provision or distribution of a basic service to the public". According to Criminal Matters Amendment Act s 1, 'basic service to the public' comprises: "Any service relating to energy, transport, water, sanitation and communication, when interfered with, which may prejudice the livelihood, wellbeing, daily operations or economic activity of the public is seen as a basic service".

transportation.[103] The prosecution may combine charges under this Act for a charge of public violence.

Section 3(1) of the Criminal Matters Amendment Act provides that a person who tampers with, damages, or destroys essential infrastructure, or colludes with, or assists others in the commission of such an activity, knowing that it is essential infrastructure,[104] is guilty of an offence, and liable on conviction to a period of imprisonment not exceeding 30 years.[105] The prescribed sentence under the Act is substantial. The Act does not provide that a number of persons must act together to commit the offence, as such, only one person can commit the offence.

In *S v Alpheus Mohlabane and Another*,[106] the court confirmed that the offence in section 3(1) is applicable to service delivery protest action. The accused were former employees of a bus company, and dismissed because of an illegal strike. They set a bus alight, which was used for public transport. Inside the bus, a person was killed, and another seriously injured. They were sentenced, *inter alia*, for damaging essential infrastructure to ten years' imprisonment, and for public violence to five years' imprisonment. The presiding officer was satisfied that the bus was used for public transport, and that it was tampered with, and intentionally damaged and destroyed. The court concluded that although some of the elements of the offence overlap with the offence of public violence, these are still two separate offences.[107] Therefore, when a number of persons damage public transport in a public place, it also constitutes the offence of public violence.

5.4.3 Offences with regard to safety at sport and recreational events

The Safety at Sports and Recreational Events Act 2 of 2010 provides for measures to safeguard the physical wellbeing and safety of persons and property at events held at stadiums, venues, or along a route. The venue or stadium must have a seating or

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103 Criminal Matters Amendment Act Preamble.

104 Criminal Matters Amendment Act s 3(2) – "A person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position and (b) the general knowledge, skill, training and experience that he or she in fact has."

105 A corporate body can also be prosecuted and sentenced to a fine.

106 *S v Alpheus Mohlabane and Another* CC133/2017, date of judgement 8/3/2018, High Court of South Africa, Gauteng Division, Pretoria (unreported).

107 *S v Alpheus Mohlabane and Another* CC133/2017.

standing spectator capacity of 2000 or more persons.[108] The event can include "sporting, entertainment, recreational, religious, cultural, exhibitional, organisational or similar activities".[109] The Act is not applicable to gatherings arranged in terms of the Gatherings Act.[110] However, nothing prohibits the prosecution to proceed with the offence of public violence when spectators become violent. The offences under the Act may be added as main or alternative charges. The Act provides for offences designed to criminalise unacceptable behaviour, such as serious injury to persons or damage to property. The Act prohibits, *inter alia*, the conduct of failing to comply with a lawful request or a directive given by a police official, or hindering a police official, a private security service provider, member of the safety and security planning committee, an access control officer, a peace officer, a member of the essential services or a member of a local authority.[111] The Act also applies to instances where an authorised member is obstructed in the carrying out of his or her duties.[112] Other prohibited conduct includes the throwing, kicking, knocking or hitting of any object within a stadium, venue or along a route;[113] the damaging or destroying of any movable or immovable property inside a stadium or venue or along a route,[114] and engaging in delinquent and antisocial behaviour, including racist, vulgar, inflammatory, intimidating, or obscene language or behaviour.[115] The prescribed sentences for these offences are substantial. In certain instances, a fine or imprisonment for a period of 20 years is applicable.[116]

5.5 Public order laws in England and India

Other countries, which include the jurisdictions of England and India, have deviated from the common-law offence approach, and have enacted legislature to specifically cater for particular problems experienced with public order. They list offences ranging

108 Safety at Sports and Recreational Events Act 2 of 2010 s 1.
109 Safety at Sports and Recreational Events Act 2 of 2010 s 1.
110 Safety at Sports and Recreational Events Act 2 of 2010 s 2(2)(b).
111 Safety at Sports and Recreational Events Act 2 of 2010 s 44(1)(n).
112 Safety at Sports and Recreational Events Act 2 of 2010 s 44(1)(o).
113 Safety at Sports and Recreational Events Act 2 of 2010 s 44(1)(p).
114 Safety at Sports and Recreational Events Act 2 of 2010 s 44(1)(q).
115 Safety at Sports and Recreational Events Act 2 of 2010 s 44(1)(r).
116 On conviction, a person may be liable in the case of contravening of s 44(1)(n) to a fine or imprisonment for a period not exceeding 20 years, or both, in the case of ss 44(1)(o) to a fine or imprisonment for a period not exceeding 10 years, or both and in any other case, to a fine or to imprisonment for a period not exceeding five years, or both.

from less serious to more serious conduct with corroborating sentences. This method enables governments to more clearly define specific unlawful conduct. In the following paragraphs, England and India will be closer examined as to their specific public order legislation.

5.5.1 England

In England, public order offences are clustered together by the lawmaker for easy accessibility. The criminal law in respect of public order offences criminalises the use of violence, or intimidation by individuals or groups. The public order offences are contained in Part I of the Public Order Act 1986,[117] and include riot,[118] violent disorder,[119] affray,[120] using threatening, abusive or insulting words or behaviour causing fear of or provoking violence,[121] using threatening, abusive or insulting words or behaviour, or disorderly behaviour intending to and causing harassment, alarm or distress,[122] using threatening, abusive words or behaviour, or disorderly behaviour likely to cause harassment, alarm or distress.[123] The Act abolishes the common-law offences of riot, rout, unlawful assembly, and affray.[124]

Provision is also made for specific kinds of conduct, for example, the Football (Disorder) Act 2000 which provides for the prevention of violence or disorder at football matches.[125] The Act allows a court to make a banning order, when satisfied that there are reasonable grounds to believe that a banning order would help to prevent violence or disorder at a football match.[126]

It seems that in England, the lawmakers attempt to curb conduct which causes specific problems by creating offences and implementing sentences which correspond to the conduct. These specific sentences range from the more serious offence of riot to less

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117 The Public Order Act 1986 c 64 Part II, http://www.legislation.gov.uk/ukpga/1986/64 (Date of use: 27 March 2017). See Dixon, McCorquodale and Williams *Cases & materials on International law* 107.

118 Public Order Act s 1.

119 Public Order Act s 2.

120 Public Order Act s 3.

121 Public Order Act s 4.

122 Public Order Act s 4A.

123 Public Order Act s 5. See Glazebrook *Blackstone's statutes on Criminal law* 135-137.

124 Public Order Act s 9(1).

125 The Football (Disorder) Act 2000 amended the Football Spectators Act 1989, and reinforced the football banning orders (FBOs) which may ban a person from any United Kingdom football grounds for two to ten years.

126 Football Spectators Act s 14A(2).

serious conduct such as using threatening, abusive words or behaviour, or disorderly behaviour likely to cause harassment, alarm or distress.[127]

The offence of riot requires that twelve or more persons must use or threaten unlawful violence[128] for a common purpose, and the conduct must cause a person of reasonable firmness to fear for his personal safety.[129] Riot can be committed in private or public places.[130] A person is guilty of riot only if he or she intends to use violence or is aware that his or her conduct is violent.[131]

The English concept of riot overlaps with the South African common-law offence of public violence. Both offences entail a group of people threatening or using unlawful violence in order to disturb the public peace and tranquillity. For riot to be perpetrated in England, more than eleven persons are requisite. It is assumed that if more than eleven persons participate using or threatening unlawful violence, serious dimensions are encompassed. A person guilty of riot is liable on conviction on indictment to imprisonment for a term not exceeding ten years or a fine or both.[132] In the case of riot connected to football hooliganism, the offender may be banned from football grounds for a period of time, and may be required to surrender his or her passport to the police.[133] The offence of riot is considered as serious since no prosecution for an offence of riot or incitement to riot may be instituted without the consent of the Director of Public Prosecutions.[134]

Another serious crime listed in the Public Order Act is violent disorder. When three or more persons use or threaten unlawful violence, and their conduct would cause a

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127 Public Order Act s 5.

128 Public Order Act s 8: 'Violence' means "any violent conduct, so that – (a) except in the context of affray, it includes violent conduct towards property as well as violent conduct towards persons, and (b) it is not restricted to conduct causing or intended to cause injury or damage but includes any other violent conduct (for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short)."

129 Public Order Act s 1(1). A riot is seen in the Canadian Criminal Code RSC 1985 c C-46 s 64 as "an unlawful assembly that had begun to disturb the peace tumultuously". A person who conceals his or her identity while taking part in a riot is guilty of an indictable offence, and liable to imprisonment for a term not exceeding ten years. See Criminal Code RSC 1985 c C-46 s 65(2).

130 Public Order Act s 1(5).

131 Public Order Act s 6(1).

132 Public Order Act s 1(6). See *R v McKeown & Ors* [2013] NICA 63 (12 November 2013); *R v Najeeb and Others* [2003] EWCA Crim 194.

133 Football (Disorder) Act 2000. Also see footnote 125 above.

134 Public Order Act s 7(1) – No prosecution for an offence of riot or incitement to riot may be instituted without the consent of the Director of Public Prosecutions. In South Africa, no prior permission from the DPP is needed to institute prosecution for the offence of public violence.

person of reasonable firmness present at the scene to fear for his or her personal safety, each of the persons is guilty of violent disorder.[135] The offence may be committed in a public or private place.[136] Violent disorder is essentially similar to the offence of riot, but provides for fewer participants – three to eleven persons. A person guilty of violent disorder is liable on conviction on indictment to imprisonment for a period not exceeding five years or a fine or both, or on summary conviction[137] to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.[138] It seems that smaller groups or less serious conduct warrants a lesser sentence than riot where imprisonment for a period not exceeding ten years or a fine or both is prescribed.

In order to be held accountable for the offence of affray, a person must:

> …use or threaten unlawful violence towards another and his or her conduct is such that it will cause a person of reasonable firmness present at the scene to fear for his personal safety.[139]

There must be conduct beyond the use of words, which is threatening and directed towards a person or persons.[140] Where two or more persons use or threaten unlawful violence, their conduct together must be considered.[141] Affray may be committed in private as well as in public places.[142] A person is guilty of affray only if he intends to use or threaten violence or is aware that his conduct is violent.[143] To commit affray, just one person is needed to threaten unlawful violence. A person found guilty of affray is liable on conviction on indictment to imprisonment for a period not exceeding three years or a fine or both, or on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.[144]

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135 Public Order Act s 2(1).
136 Public Order Act s 2(4).
137 Summary offences are normally dealt with in the magistrate's court and governed by Part 37 of the Criminal Procedure Rules 2010. In such proceedings there is no jury, the appointed judge decides the guilt or innocence of the accused. Each summary offence is specified by statute which describes the (usually minor) offence. see Criminal Procedure Rules 2010, Summary offences and the Crown Court.
138 Public Order Act s 2(5).
139 Public Order Act s 3(1).
140 Public Order Act s 3(3).
141 Public Order Act s 3(2).
142 Public Order Act s 3(5).
143 Public Order Act s 6(2).
144 Public Order Act s 3(7).

The common law offence of assault[145] in South Africa covers most of the elements in the offence of affray. However, affray is a public order offence created for circumstances of disorder. South Africa does not have any specific public order offences, and the common-law offence of assault is utilised in private and public disorder situations.

A third specific public order offence is provocation of violence. A person may be held liable for this crime if he or she:

> (a) uses towards another person threatening, abusive or insulting words or behaviour, or (b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting, with intent to cause that person to believe that immediate unlawful violence will be used against him or another, or to provoke the immediate use of unlawful violence by that person or another, or the believe that such violence will be used or is likely to be provoked.[146]

An offence under this section may be committed in a public or a private place, except that no offence is committed while both persons are inside dwellings.[147] It seems that domestic violence in a dwelling is not intended to fall under this offence. A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 (£5,000) on the standard scale or both.[148] The common-law offence of assault in South Africa is wide enough to include threatening conduct committed in a dwelling and in domestic-violence situations.

A person may also be found guilty of the offence of intentional harassment, alarm or distress, with intent to cause a person harassment, alarm or distress, if he or she:

> (a) uses threatening, abusive, insulting words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting, thereby causing a person harassment, alarm or distress.[149]

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145 According to Snyman *Snyman's criminal law* 395, assault constitutes "any unlawful and intentional act or omission which results in another person's bodily integrity being directly or indirectly impaired, or inspires a belief in another person that such impairment of her bodily integrity is immediately to take place". As a common-law offence, the discretion for the sentencing of assault is left in the hands of the presiding officer. Generally, an assault case will proceed in the district court, where imprisonment of three years can be implemented.

146 Public Order Act s 4(1).

147 Public Order Act s 4(2).

148 Public Order Act s 4(4).

149 Public Order Act s 4A(1).

An offence under this section may be committed in a public or a private place, however no offence is committed if the persons are present in dwellings.[150] A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5[151] on the standard scale or both.[152] In South Africa, in similar circumstances to this crime, a victim would be entitled to apply for a harassment order.[153] When such an order is granted by a magistrate and not adhered to, it constitutes an offence.[154] However, the main focus of the Protection from Harassment Act 17 of 2011 is not public order or offences against the state.

The last offence under the Public Order Act is that of harassment, alarm or distress. A person is guilty of an offence if he or she:

> (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or (b) displays any writing, sign or other visible representation which is threatening or abusive, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.[155]

An offence under this section may be committed in a public or a private place, except that no offence is committed if the parties are inside dwellings.[156] A person is guilty of this offence only if he or she intends his or her words or behaviour, to be threatening or abusive, or is aware that it may be threatening or disorderly.[157] A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.[158] Seemingly, this offence attempts to discourage

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150 Public Order Act s 4A(2).
151 Not exceeding £5000.
152 Public Order Act s 4A(5).
153 Under the Protection from Harassment Act 17 of 2011. The Protection from Harassment Act s 1 declares that a person is guilty of the offence if he or she is "directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant by unreasonably - following, watching, pursuing or accosting of the complainant or loitering outside of or near the building or place where the complainant happens to be; engaging in verbal, electronic or any other communication aimed at the complainant; or sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant; or amounts to sexual harassment of the complainant". Harm means any mental, psychological, physical or economic harm. There is also no requirement that persons must be outside a dwelling for this crime to occur.
154 Under the Protection against Harassment Act in South Africa s 18, any person who contravenes any prohibition, condition, obligation or order is guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years.
155 Public Order Act s 5(1).
156 Public Order Act s 5(2).
157 Public Order Act s 6(4).
158 Public Order Act s 5(6).

unwanted conduct by a person or group before it escalates into more serious behaviour.

5.5.2 India

In India, the criminal law is mainly contained in the Indian Penal Code and the Criminal Procedure Code.[159] Chapter VIII provides for offences against the public tranquillity.[160] These include unlawful assembly, rioting, affray, assaulting or obstructing a public servant when suppressing riot, provocation with the intent to cause riot, promoting enmity between different groups on ground of religion, race, place of birth, residence, language, et cetera, and doing acts prejudicial to maintenance of harmony, being an owner or occupier of land on which an unlawful assembly is held, hiring persons to join unlawful assemblies, and harbouring persons hired for an unlawful assembly. Each of these offences will consequently be discussed below in more detail.

The offence of an unlawful assembly prohibits unlawful assemblies by listing the numerous ways it can be committed:

> An unlawful assembly consists of five or more persons, with the common object of the participants to overawe by criminal force, or show of criminal force, the central or any state government or parliament or the legislature of any state, or any public servant in the exercise of the lawful power of such public servant; or to resist the execution of any law, or of any legal process; or to commit any mischief or criminal trespass, or other offence; or by means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.[161]

More than four participants are needed to commit the offence. The criminalised conduct ranges from using force against the government, utilising force when trespassing, issues with water, or the right of way. It is an offence being a member of

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159 Ratanlal and Dhirajlal *The Indian Penal Code* iii.

160 Gour *Sir Hari Singh Gour's commentaries on the Indian Penal Code* 467.

161 Indian Penal Code s 141. See also the Canadian Criminal Code RSC 1985 c C-46 s 63(1) where an unlawful assembly is defined as consisting of "three or more persons who, with common purpose, assemble in such a manner or conduct themselves so as to cause persons in the neighbourhood to fear, that they will disturb the peace tumultuously or will provoke other persons to disturb the peace". Any member of such unlawful assembly is punishable on summary conviction. See Criminal Code RSC 1985 c C-46 s 66(1).

an unlawful assembly,[162] and it is punishable with imprisonment of six months, or with a fine, or with both.[163] A lawful gathering can become unlawful. Joining or continuing with an unlawful gathering, knowing that the participants had been ordered to disperse, constitutes an offence, and is punishable with imprisonment of two years or with a fine, or with both.[164] When a participant of an unlawful assembly fails to disperse after being commanded to do so, it is a punishable offence with imprisonment of six months or with a fine or with both.[165] When a participant joins an unlawful gathering armed with a weapon which is likely to cause death, he or she may be punished with imprisonment of two years or with a fine, or with both.[166] The common-law offence of public violence in South Africa overlaps with this offence, however, the public violence definition does not provide for specific conduct or circumstances.[167]

In India, rioting is committed when force or violence is used during an unlawful assembly, or by any participant in furthering the common objects of the assembly. Every participant is guilty of the offence of rioting,[168] and it is punishable with imprisonment of two years or with a fine, or with both.[169] Rioting armed with a deadly weapon carries a punishment of imprisonment of three years or with fine, or both.[170] This offence does not provide for the interference with public peace or tranquillity, though the use of force or violence would usually disturb the peace of persons in the vicinity.

Affray is committed when two or more persons, fighting in a public place, disturb the public peace.[171] If found guilty, the punishment consists of imprisonment of one month, or with a fine of one hundred rupees, or both.[172] This offence overlaps with the

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162 Indian Penal Code s 142. Indian Penal Code 445 – "Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly."

163 Indian Penal Code s 143.

164 Indian Penal Code s 143.

165 Indian Penal Code s 151.

166 Section 143 of the Indian Penal Code. In South Africa, the Gatherings Act s 8(4) prohibits a person in a gathering to have in his or her possession any type of gun or any object resembling a gun and is likely to be mistaken for a gun. See also s 1 of the Firearms Control Act 60 of 2000 and s 1 of the Dangerous Weapons Act 15 of 2013. See also footnote 25 in Chapter 3, and the discussion in 4.4.11.

167 Gatherings Act s 9. See para 4.4.7 above.

168 Indian Penal Code ss 447-449.

169 Indian Penal Code ss 447-449.

170 Indian Penal Code ss 447-449.

171 Indian Penal Code s 159.

172 Indian Penal Code s 160.

common law offence of assault in South Africa,[173] however, the Indian offence is specifically designed for the public order category.

In India, the conduct when a person assaults, obstructs or threatens to assault a public servant while busy dispersing an unlawful gathering, or suppressing a riot or affray; or uses, or threatens criminal force against the public servant, is specifically criminalised. Contravening such offence makes one liable to be punished with imprisonment for a term of three years or a fine, or with both.[174] In South Africa, prosecution will usually be instituted for similar conduct under section 67 of the SAPS Act which provides that nobody may interfere with a member of the police when exercising his or her duties.[175] Section 12(1)(j) of the Gatherings Act also provides for an offence if the police are hindered in their duties when dispersing unlawful gatherings.[176]

It is furthermore illegal for any person to do anything unlawfully, malignantly or wantonly to provoke any person, knowing that rioting will be committed. If the rioting does take place, the punishment prescribed is for a term of imprisonment of one year or with a fine, or with both; if the offence of rioting is not committed, the prescribed sentence is imprisonment for a term of six months or with fine, or with both.[177] A less severe sentence is applicable when riot was not committed. In South Africa, it is an offence to compel or attempt to compel any person to attend, join or participate in a gathering or demonstration.[178]

A very specific offence in India prohibits acts which promote enmity, or disturb the harmony or public tranquillity, or cause fear or alarm or a feeling of insecurity. This offence is defined as:

> Anyone who by words, signs, visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence,

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173 Offences created in municipal by-laws in South Africa may also cover instances where two or more persons disturb the peace, e.g., the Nuisance By-Law promulgated by the Govan Mbeki Municipality in the Provincial Gazette Extraordinary no. 2385 dated 11 November 2014 states: "No person shall disturb the public peace in any public place by making unseemly noises or by shouting, roaring, wrangling or quarrelling, or by collecting a crowd, or by fighting or challenging to fight, or by striking with or banishing or using in a threatening manner any stick or other weapon, or by any other riotous, violent or unseemly behaviour, at any time of the day or night". A person found guilty is liable to a fine of five thousand rand or imprisonment of six months.

174 Indian Penal Code s 153.

175 A person is liable with a fine or imprisonment for a period not exceeding twelve months.

176 See discussion in para 4.4.10 above.

177 Indian Penal Code s 153.

178 Section 8(10) of the Gatherings Act.

> language, caste or community or any other ground, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or commits any act which is prejudicial to the maintenance of harmony between groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity - or organises any exercise, movement, drill or similar activity intending that the participants shall use or be trained to use criminal force or violence or knowing it to be likely that the participants will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such is likely to cause fear or alarm or a feeling of insecurity amongst members of such entity, shall be punished with imprisonment which may extend to three years, or with a fine, or with both. When the offence is committed in place of worship, imprisonment which may extend to five years and a fine will be applicable.[179]

This offence is so broad that it includes the organising of training or training of participants of groups in criminal force or violence. In South Africa, a participant of a gathering or demonstration may not make use of a poster, notice board, discourse or singing, et cetera to incite hatred because of cultural, racial, sexual, language or religious differences.[180]

Additionally, the owner or occupier of land where an unlawful gathering or riot takes place can be held accountable if he or she does not notify the police, and did not use all lawful means in his or her power to prevent, disperse or suppress it.[181] A sentence of a fine not exceeding one thousand rupees is applicable.[182] This offence does not exist in the South African context. The owner or occupier of land can obtain a court order prohibiting persons to trespass or gather on the property. It is furthermore the duty of the police to disperse participants who unlawfully gather on private land. The Indian offence may assist in aiding and bringing information more speedily under the attention of the police to assist sooner rather than later. However, to criminalise this failure of the owner may be met with constitutional challenges in South Africa.

In India, it is an offence to hire persons to join an unlawful gathering.[183] The hired person can also be prosecuted, and is liable on conviction with imprisonment for a

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179 Section 153A of the Indian Penal Code.

180 Section 8(5) of the Gatherings Act. Similarly, Gatherings Act s 8(6) criminalises the performance of any act or utterance of any words which are calculated or likely to cause or inspires violence against any person or group of persons.

181 Section 156 of the Indian Penal Code.

182 Section 156 of the Indian Penal Code.

183 Indian Penal Code s 150.

period of six months or with a fine, or with both.[184] This offence does not exist in the South African law although it is well known that people are recruited and paid to gather for purposes of protest action, organised crime or political or financial gain. It is alleged that organised groups commit offences under the pretence that they are participating in lawful gatherings, while their only intent are to loot shops, burglar houses, rob community members or dissemble money and jobs from businesses. In South Africa, it is possible to prosecute a person who hired others to commit public violence on charges of conspiracy or incitement to commit public violence.[185] However, it is difficult to prove that a person was hired to commit public violence.[186] It is also debatable if a person, hired to protest for some gain, can invoke the protection given to the right to gather under the South African Constitution.[187]

The last Indian public order offence to be discussed is the harbouring, on a premises under his or her control, of any persons knowing that they have been hired to join an unlawful gathering. This offence is punishable with imprisonment of six months or with a fine, or with both.[188] It is, therefore, an offence to support a person who is hired to participate in a gathering with a place to stay. This offence does not exist in South Africa with regard to unlawful gatherings. However, in South Africa, anybody who harbours or conceals a person who is about to commit or committed an offence under the Protection of Information Act 84 of 1982, or permits such persons to meet or gather on a premises under his or her control, is guilty of an offence.[189]

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184 Section 158 of the Indian Penal Code.

185 Section 18 of the Riotous Assemblies Act 17 of 1956.

186 See, e.g. Umraw https://www.pressreader.com/south-africa/beeld/20170802/281569470808835 (Date of use: 1 December 2020). In this article, it is reported that Lord Bell, previous head of the Bell Pottinger Company, was requested by the Guptas to organise protest marches in South Africa, and to search for and recruit persons to participate in protest action. It is however uncertain how the participants were recruited and paid for their duties.

187 See Chapter 3 above.

188 Indian Penal Code s 157.

189 The Protection of Information Act 84 of 1982 prohibits certain acts in relation to "prohibited places, obtaining and disclosure of certain information, acts prejudicial to security or interests of Republic and the obstruction of persons on guard at prohibited places." Section 7 of the Protection of Information Act 84 of 1982 determines that on conviction of this offence, a person is liable to a fine of R1 000 or to imprisonment for 12 months or to both such fine and such imprisonment. According to s 12, the written authority of the DPP is needed to continue with prosecution.

5.6 Conclusion

In South Africa, the offence of public violence is applicable when violence or weapons are part of the conduct of a gathered group. Accordingly, the right to gather peacefully and unarmed, as guaranteed by the Constitution, is jeopardised. It must, however, be taken into consideration that international and regional instruments allow for some measure of harassment; isolated acts of violence; annoying conduct; deeds that give offence or temporarily hinders, impedes, or obstructs the daily activities of members of the public, while still deeming the gathering peaceful. Therefore, the above-mentioned conduct will not render a gathering as a whole not peaceful. Still, this type of conduct holds implications for how a police member views the happenings at a gathering.

As deliberated on in paragraph 5.3, it is evident that some of the elements of the common-law offence of public violence lack clearness, and are accordingly open to having several possible interpretations. One such element requires that conduct must constitute ‘serious dimensions’, which implies that participants will not be arrested or prosecuted for minor forms of violence. However, if the conduct is not serious, the prosecution can proceed on other offences, for example, malicious damage to property or contravention of the National Road Traffic Regulations 2000. It is difficult to determine beforehand what conduct will actually constitute ‘serious dimensions’. The opinions of the police member, the member of the public, the organiser, or participants on the scene may differ.

The number of persons necessary to commit this offence varies from case to case, and cannot be predicted in advance, since it is closely linked with the requirement that conduct must reach ‘serious dimensions’. The definition of public violence is furthermore very broad since conduct may include, for example: tribal fights, student protests, service delivery protests, trespassing on property, gang-related fights, private quarrels, destroying infrastructure, looting, organised crime, and sport-related violence. The ordinary layperson may struggle to establish exactly what public violence conduct is criminalised, or when such conduct becomes unlawful. It is further challenging to determine when precisely the public peace and order is disturbed, or the rights of others infringed, since most gatherings will annoy or hamper other citizens in their daily goings-on. The unrepresented participant needs to ascertain when

conduct will be seen as forceful, violent, or in excess by the police members on the scene.

Depending on the seriousness of the conduct, factors including time, locality, duration, damage, injuries, or violence, the case can be heard in the district, regional or high court, which also implies different sentences from each type of court. The discretion with regard to the forum is that of the prosecution. The accused in public violence matters may find it difficult to access the prescribed sentence, and to foresee the effects. The reality is that only at the end of a trial, when the presiding officer has heard and considered all the evidence, it is clear whether all the requirements of the definition were met. The offence of public violence is, therefore, not clearly defined, and can possibly not legitimately be regarded as a criminal offence.

The public violence offence is the primary offence to prosecute the violent conduct of a number of people in South Africa. In reality, public violence cases in court generally consist of a combination of charges of public violence, and other common law and statutory offences. Not all of these offences were created with public order in mind, therefore, a person accused of public violence may be caught unaware. The public violence offence in South Africa also does not provide for a scale of serious to less serious conduct with applicable sentences. It seems that it is a matter of convenience for the state to prosecute any violent group conduct under the public violence umbrella.

In certain countries, such as England and India, specific offences were created to cater for specific problems experienced with public order. These countries have departed from the one-offence-fits-all-conduct-approach, and enacted specific legislation to cater for particular problems with reasonable sentences. In this manner, these countries have clustered public order offences together. The offences are clearly defined, and more understandable in contrast to an endeavour to prosecute all violent conduct under a one basket-offence. The laws are more accessible to members of the public, and clarify what conduct will be deemed unlawful and unacceptable. Grouping all offences relating to public order together has an educational purpose, and is important since people often utilise their right to gather.

Public order offences must prohibit the use of violence or intimidation by individuals or groups, and control and curb violent gatherings. The offences, therefore, must target specific behaviour with correlating sentences. It may be useful for the South African

legislature to create offences criminalising less serious conduct which is generally part of unwanted behaviour at gatherings, without continuing with the common-law offence of public violence which is deemed serious. To prohibit specific conduct may assist the police to remove persons displaying threatening or disorderly behaviour from gatherings before it escalates in more serious conduct. A distinction between serious and less serious conduct, and what it entails, can assist to finalise prosecution more speedily, especially if alternative resolution options, for example, mediation or diversion, are applicable.

It is evident that even though the common-law public violence offence may be a convenient tactic to prosecute a number of persons in a violent gathering, it may not be the most effective approach to do so. Accordingly, in the following chapter, other offences applicable to the right to gather will be considered.

CHAPTER SIX

OTHER OFFENCES APPLICABLE TO THE RIGHT TO GATHER

6.1 Introduction

South Africa uses a blend of common law and statutory offences to curb occurrences of public order misbehaviour. Most of these offences were not specifically enacted to restrain unlawful conduct during gatherings, and have a more general application. The offences of sedition, offences under the Trespassing Act 6 of 1959, incitement under the Riotous Assemblies Act 17 of 1956, offences under the National Road Traffic Regulations 2000,[1] and offences under the Intimidation Act 72 of 1982 can be utilised by the prosecutor in cases relating to dissent, mass-action or protest. In the correct circumstances, they may also be described as public order offences.[2]

It is important to establish whether these offences are still adequate to deal with violent conduct at gatherings. The reasons for protest action, and how the acts take place are ever-changing, therefore, provision must be made for new trends and developments. A further question required to be investigated is whether the current offences conform to the Constitution of South Africa. Legislation prohibiting conduct before and during gatherings must be reader-friendly, easily understandable, and accessible to the general man on the street.

For the purpose of this chapter, reference to a gathering includes protests**,** strikes, assemblies, pickets and demonstrations. The term gathering is therefore used in a general context.[3] Each of the above-mentioned public order offences will accordingly be successively investigated.

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1 Published in *GG* 20963 dated 17 March 2000, *GN* R225.

2 Snyman *Snyman's criminal law* viii categorises public violence as an offence against the state and trespassing as an offence relating to damages to property, intimidation is categorised under offences against bodily integrity. Burchell and Milton *Principles of Criminal law* xi categorise public violence under offences against the community interest.

3 Under the definition of a gathering in the Gatherings Act, a gathering includes more than fifteen persons.

6.2 Sedition

After 1990, it seems that no prosecution was instituted under the common-law offence of sedition in South Africa. The prosecution preferred to proceed with the common-law offences of public violence,[4] terrorist- and related activity offences,[5] or incitement to commit offences.[6] However, in the neighbouring countries of Namibia and Lesotho, which previously formed part of South Africa, prosecution for sedition continued.[7] Since the offence of sedition is not presently utilised by the state in situations where participants gather with the intention to challenge, defy or resist the authority of the state, reference is made in this chapter to case law of Namibia and Lesotho.

The crime of sedition often involves a disturbance of public peace, order and tranquillity, and an offender may be charged with either sedition or public violence. Yet sedition differs from public violence in that it is aimed at the authority of the state, whereas public violence is aimed at public peace and tranquillity.[8] Similar to the offence of public violence, sedition can be committed only if a number of people (more than two)[9] gather together, or there is a concourse of persons. Analogous to the crime of public violence, the gathering of the people must be accompanied by violence or threats of violence.[10] However, the mere fact that a number of people gather together with the intention of committing a crime, or to break the law is not yet sufficient to constitute sedition – for the crime to be committed, there must be mutual conduct by

4 See Chapter 5 above.

5 The Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 was enacted due to the UN Security Council Resolution 1373/2001, which is binding on all member states of the UN. The Convention for the Prevention and Combating of Terrorism, adopted by the OAU, requires member states to become party to instruments, dealing with terrorist and related activities. See preamble.

6 See para 6.4 below.

7 In *S v Monyau* [2005] 3 ALL SA 90 (LESCA), the appellant appealed to the Lesotho Court of Appeal against his conviction of sedition. The appellant attended meetings with the intention to subvert the state. In *Mahupelo v The Minister of Safety and Security* (56/2014) [2017] NAHCMD 25 (2 February 2017), the accused were arrested by the Namibian Police based on information that they planned and influenced people to take up arms to secede Caprivi from Namibia; the accused were prosecuted on 278 charges*, inter alia*, sedition. See *Chunga v Minister of Safety and Security* 2018 JDR 0108 (Nm).

8 Snyman *Snyman's criminal law* 275; *S v Twala and Others* 1979 (3) SA 864 (T) 868 (hereinafter *Twala*).

9 Snyman *Snyman's criminal law* 275-276. In the *Twala* case (para 869F), the view was expressed that two persons are sufficient.

10 Snyman *Snyman's criminal law* 276.

a group of persons whereby the authority of the state is challenged.[11]

Although the definition of sedition seems unclear, and its application is extensive, the constitutionality thereof will never properly be tested since the offence of sedition is currently in disuse. South Africa is not the only country where prosecution for sedition ceased – in the United States of America, no prosecution is instituted with regard to the offence of seditious conspiracy.[12]

The offence of sedition is intended to suppress revolutionary calls for political and social reform or when it is detrimental to keep the authority of the state intact,[13] but governments can exploit this offence to silence any criticism against the government, leadership or political parties.

6.2.1 Definition

Snyman describes sedition as:

> …the unlawfully and intentionally taking part in a concourse of people, violently or by treats of violence challenging, defying or resisting the authority of the state of the Republic of South Africa, or causing a concourse.[14]

Sedition is aimed against the authority of the state. Not only those who take part in the gathering but also those who incite, instigate or arrange the gathering, provided that it does take place, are guilty of the offence.[15] Sedition cannot be committed by only one person; more than one person is required to qualify as a perpetration of the offence.[16] The state needs to prove that an unlawful meeting took place attended by different people challenging, defying, or resisting the authority of the state. It is irrelevant where it takes place online or offline, in private or in a public place. However, when a

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11 Snyman *Snyman's criminal law* 276; see also *S v Zwane and Others* 1989 (3) SA 253 (W) para 261E (hereinafter *Zwane and Others*).

12 Seditious Conspiracy 18 US Code s 2384 states: "If two or more persons in any state or territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both".

13 Burchell and Milton *Principles of Criminal law* 683.

14 Snyman *Snyman's criminal law* 274.

15 Snyman *Snyman's criminal law* 277.

16 The general meaning of 'concourse' includes "a crowd or assembly of people", i.e. a gathering of people. See Pearsall (ed) *Concise Oxford English Dictionary* "concourse".

gathering takes place online, procuring evidence may hamper the prosecution thereof since the police are not always equip to obtain and link the evidence with the participants.[17]

Certain concerns may be raised with regard to the breadth of the sedition definition, for example, the definition does not explain when participating is deemed unlawful.[18] The intent to defy or subvert the authority of the state can also be widely interpreted to include expressions of grievances and protest against the government.[19] In India, for example, anyone who shows hatred, contempt or disaffection[20] towards the government, commits the offence of sedition.[21] However, comments expressing dissatisfaction with the measures, administration, or actions of the government with a view to obtain change by lawful means are excluded under this offence.[22] This provision guarantees the right of a person to disapprove or protest against an ineffectual government.[23] In South Africa, the offence of sedition lacks this integral reassurance that one may disapprove of the government.[24] It is furthermore uncertain how many persons are required to constitute an unlawful gathering, since it depends on the circumstances and the discretion of the presiding officer after all the evidence is admitted.[25] The question is still debated whether an unlawful gathering needs to include violence, threats of violence, or forcible conduct.[26] As a result, the average man on the street will find it difficult to understand when conduct constitutes the offence of sedition since it is open to different interpretations.

6.2.1.1 Violence or no violence?

In South African law, there is disagreement whether violence is an element of sedition. This question was raised before the Namibian High Court in *S v Malumo.*[27] The

17 The Regulation of Interception of Communication and Provision of Communication-related Information Act 70 of 2002 and Electronic Communications and Transactions Act 25 of 2002 are applicable.
18 See para 6.2.2.2 below.
19 Hoctor 2005 *SACJ* 341.
20 Disaffection includes “disloyalty and all feelings of enmity”.
21 Section 124A, Indian Penal Code 396-401.
22 Indian Penal Code 400.
23 Indian Penal Code 400.
24 Hoctor 2005 *SACJ* 341.
25 See para 6.2.2.3 below.
26 See para 6.2.2.1 below.
27 *S v Malumo* 2013 JDR 0231 (Nm) (hereinafter *Malumo*).

accused was prosecuted on charges of high treason and sedition,[28] after he held various meetings where plans were made to overthrow the state.[29] The court stated that contrary to Snyman's view that violence is a necessary element of the crime of sedition,[30] it was not required by courts as an element of the offence during the last years.[31] The court referred to the South African court decision of *S v Twala and Others*,[32] where the following elements were found to constitute sedition:

> …a gathering which is unlawful, with intent (not necessarily hostile) to defy or subvert the authority (*majestas*) of the state. As far as the element of 'unlawfulness' is concerned, the usual principles apply, namely that the performance or non-performance of an act is unlawful if it is contrary to some legal prohibition and is proved by proof of the act complained of, unless, objectively seen, some justification or another exists. Proof of this element is usually compounded with the *mens rea* of the accused to defy or subvert or assail the authority of the government. As far as the element of a gathering is concerned, a gathering is the congregation or the coming together of a number of people and when it occurs, with the intent to defy, subvert or assail the authority of the government, the crime of sedition has been committed. To constitute a 'gathering' it is sufficient if an unspecified number of people come together with the necessary intent, and even two would be sufficient. Such a gathering can take place anywhere, whether in a public place or in a private place. What is paramount is the presence of the intention to defy the authority of the state. The gathering need not be accompanied by violent and forcible conduct and violence is certainly not an essential part of the seditious gathering. What is essential is that the gathering occurs with the necessary intent. If regard is had to the quality of the intention required, namely to *defy* or *subvert* or *assail* the authority of the state or its officials, there is no logical reason why violence must be regarded as a natural concomitant, or an essential element of a seditious gathering.[33]

The court also referred to examples of nonviolent seditious gatherings which included the burning of pass books in the early 1950s, and workers' strikes against labour legislation.[34] It is, however, debatable whether these examples do not constitute a degree of violence or force.

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28 Although charged with high treason and sedition, the distinction between these two crimes is arbitrary, especially if one considers that challenging the state's authority can in all probability not be divorced from acts by which the government is coerced into a certain line of action or which threatens its safety – then there is no difference in this respect between the two crimes. See Snyman *Criminal law* 319.

29 *Malumo* para [6].

30 See footnote 10 above.

31 *Malumo* para [84].

32 *Twala* 864.

33 *Twala* para 896H.

34 *Malumo* paras [34]-[35], *Twala* 870-871.

In *R v Monyau*,[35] the Court of Appeal in Lesotho considered whether a gathering had to have some element of 'unruliness or restiveness' to give rise to the offence of sedition. The appellant, a priest at the Roman Catholic Cathedral in Maseru, was convicted of sedition and sentenced to fifteen years' imprisonment.[36] The conviction stemmed from serious civil disturbances that took place in Lesotho. The appellant played an important role in securing the presence of army attendees, provided cell phones to them, and assisted with hiding men and funds.[37] The court firstly referred to *Molapo v R*,[38] applying the definition of sedition advanced by Milton,[39] namely that sedition consists in the unlawful gathering of a number of people, with the intention of impairing the *majestas* of the state by defying or subverting the authority of its government, but without the intention of overthrowing or coercing the government. The court mentioned that Milton does not contend that the gathering in question must itself necessarily be violent, but argued for the presence of some element of violence (in the form of a threat or to incite violence) before persons should be punished for exercising their constitutional right of coming together to protest.[40] The court then referred to *S v Zwane*, where it was decided that:

> Although sedition may take the form of an armed uprising or violent resistance of a tumultuous mob in defiance of established authority, I am of the view that a seditious gathering need not necessarily involve an uprising or not, or be coupled with clamour, uproar, violence or threats of violence. It seems to me that the weight of authority only requires a gathering in defiance of the authorities and for an unlawful purpose to constitute the crime of sedition.[41]

The *Zwane*-decision was previously criticised by Snyman, Burchell and Milton.[42] The court further referred to *R v Endemann*,[43] where the court found that "to constitute the crime of sedition, it is not necessary that acts of violence should have been actually committed".[44] The *Monyau* court decided that the argument of the appellant that violence is a requirement for sedition disregards the nature of present-day society and

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35 *R v Monyau* (C of A (CRI) 11/04 CRI/T/111/2002) (CRI/T/111/2002) [2005] LSHC 88 (20 April 2005) 865-866 (hereinafter *Monyau*).
36 *Monyau* para [1].
37 *Monyau* paras [5]-[7].
38 *Molapo v R* [1999-2000] LLR-LLB 316 320 (hereinafter *Molapo*).
39 Milton *South African Criminal law and procedure*: *Common law crimes* 42.
40 *Molapo* para [16].
41 *S v Zwane* 1987 (4) SA 369 (W) 374 (hereinafter *Zwane*).
42 *Monyau* para [14].
43 *R v Endemann* 1915 TPD 142.
44 *Monyau* para [15].

the functioning of the state. A state may be brought to its knees by schemes which involve no violence or no threats of violence, for example, hacking into computer systems, or interference with telecommunications.[45] The court deliberated that it may be necessary in the future to review the definition of sedition since the common law must comply with the Constitution of Lesotho. Certain *dicta* and academic writings in South Africa may have to be reconsidered in Lesotho to the extent that they suggest that "acts falling short of subversion and defiance, and which amount only to a challenge to authority or protest against its exercise"[46] constitute sedition.

Usually some degree of violence, or the threat of violence or force materialises as part of the facts of a sedition case, ruling this question irrelevant.[47] Snyman is of the opinion that when two or three persons gather and challenge the authority of the state, but they stay passive and disperse peacefully, they cannot be found guilty of sedition.[48] Incitement or conspiracy to commit sedition will be a more appropriate approach. On the other hand, when persons gather peacefully with the intention to defy the authority of the state by hacking the government's online services, the act may seem non-violent but it will disturb service delivery and the lives of the general public. It can be argued that if violence or threats of violence is not a requirement, participants of state capture,[49] diverting massive amounts of state money and disrupting the proper functioning of the state by defying the state, can also be charged with sedition.

Seditious conduct usually requires some planning, and takes place over a period of time. The gathering or meeting becomes unlawful when these plans are made and decisions are taken with the intent of impairing the *majestas* of the state by defying or subverting the authority of its government. Accordingly, the happenings or plans prepared at the meeting or gathering is the focus of this offence. In most instances, the actual conduct of impairing the *majestas* of the state by defying or subverting the authority of the state is conducted in a forceful way.

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45 *Monyau* para [17].
46 *Monyau* para [19].
47 Force is seen as a part of violence. See para 5.2.2.3 footnote 62 above.
48 Snyman *Snyman's criminal law* 276.
49 State capture implies, *inter alia*, that government procedures are manipulated by parties or individuals to influence state policies, or the reassignment of state money to promote private interests to the detriment of the people of a state.

6.2.1.2 Defying or assailing the authority of the state

A gathering is seditious if it intentionally defies or assails the authority of the state.[50] Sedition differs from high treason in that treason requires a hostile intent, while for sedition intent to resist or challenge the authority of the state is needed.[51] Examples of sedition include, amongst others, holding people's courts,[52] attacking police stations, or seizing essential infrastructure belonging to the state. The participants in the same gathering may have the intent to defy public peace and tranquillity, and also to defy or assail the authority of the state. Although it is expected that the authority of the state should be openly resisted, challenged, or disobeyed; a person can defy the authority of the state in committing a seditious act by holding a seditious gathering in private.[53] Each individual member of the gathering must know that the other participants or a substantial number of them have the same aim, therefore, that they act in concert.[54] A gathering with the intention of committing an offence is not sufficient to constitute a seditious gathering.[55]

The dividing line between levelling criticism at the government and impairing the authority of the government can almost be non-existent, as seen in *Rudolph and Others v Minister of Safety and Security and Another.*[56] In this case, eight persons gathered at a bridge when the police informed them that their assembly was an unlawful gathering since they did not have the requisite permission. The appellants were given fifteen minutes to disperse, and later arrested on a charge of sedition.[57] The court decided that the appellants were involved in a peaceful protest, and there was nothing seditious about their conduct or utterances. It was more probable that the police were annoyed by their conduct or the tone of the appellants' placards. The court found that in a democratic society, people need to be tolerant – even of views which may seem unpalatable.[58] The offence of sedition can, therefore, inhibit legitimate political action and the right to gather. Disapproval or opposing remarks of political

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50 *Zwane and Others* 253.
51 Snyman *Snyman's criminal law* 277. See also Snyman 1980 *SALJ* 14-24.
52 Instead of the state's official courts, and resulting is so-called township justice.
53 Snyman *Snyman's criminal law* 276. See also Snyman 1980 *SALJ* 14-24.
54 Snyman *Snyman's criminal law* 277.
55 Snyman *Snyman's criminal law* 277.
56 *Rudolph and Others v Minister of Safety and Security and Another* 2009 (5) SA 94 (SCA) (hereinafter *Rudolph and Others*).
57 *Rudolph and Others* paras [7]-[11].
58 *Rudolph and Others* para [24].

parties or groups may be seen as resistance or challenges to the authority of the state, and peaceful protest may be regarded as seditious.[59] It is a different situation in Canada, for example, where everyone is presumed to have seditious intention who advocates, publishes, or circulates any writing supporting the use of force as a means of achieving governmental change.[60] However, seditious intention is excluded if a person, in good faith, shows that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution.[61] Such provision safeguards political dissent and protest action against the government.

On the other hand, the question can be asked whether people participating in a seditious gathering may resort to violence or any other means to free themselves from the oppression of a government. May one resort to conduct going beyond dissent and protest action to lawfully defy or assail the authority of the state? This implies that accused will be able, when prosecuted for sedition, to claim that they were forced to use unlawful conduct to resist domestic oppression. Article 20 of the African Charter – which South Africa is a party of and consequently legally bound to its provisions – postulates for a right to free oneself from or to resist oppression:

> 2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.

Article 20(2) specifies a defence when an accused on a charge of sedition is acting within internationally recognised lawful means. The article provides for an exceptional human right, i.e. to commit unlawful acts as a means to resist unlawful use or abuse of power.[62] It is seen as a 'self-help' remedy, and includes a broad spectrum of illegal conduct (from peaceful to violent).[63] It is unclear whether this right also applies in resisting unconstitutional, corrupt, or unresponsive governments.[64]

In order to establish whether an accused may rely on this right, it must be taken into consideration whether the accused were denied their right to political, economic and democratic change, and excluded from democratic political participation; if conditions constituting oppression or domination can be established, when the law is oppressive,

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59 Hoctor 2005 *SACJ* 341.
60 Criminal Code RSC C-34 s 59(4).
61 Criminal Code RSC C-34 s 60.
62 Murphy 2011 *AHRLJ* 465-466.
63 Murphy 2011 *AHRLJ* 469.
64 Murphy 2011 *AHRLJ* 470.

unconstitutional, or corrupt; and whether the community have no prospect of any other available, effective and sufficient remedy.[65] When the answer to all of above is in the affirmative, the accused have a justified right to resist under article 20(2) of the African Charter.[66] The right to resist has already found its way into South African legislation. Section 1(4) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 provides that any act committed during a struggle waged by people, including any action during an armed struggle, in the exercise of a legitimate right to national liberation, self-determination and independence against colonialism, occupation, aggression or domination by alien or foreign forces, cannot be a terrorist activity.[67]

6.2.1.3 Number of persons

High treason can be committed by only one person, while sedition and public violence need to be committed by a number of people acting together.[68] With the offence of sedition and public violence,[69] it is uncertain what number of participants will be sufficient to constitute the offence. Snyman is of the opinion that more than two people are required since "something more sinister, menacing or threatening is needed".[70] In the case of *Twala*,[71] the court found that two persons can constitute a seditious gathering.[72] However, the mere attendance of two or more persons coming together or holding a meeting is not prohibited. A gathering is only seditious when it intentionally defies or assails the authority of the state.[73] It will depend on the circumstances and facts of each case and the discretion of the presiding officer what number of participants will suffice to constitute this offence.

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65 Murphy 2011 *AHRLJ* 470.
66 See *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995); *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009).
67 See discussion at para 6.2.2 below.
68 Snyman *Snyman's criminal law* 275.
69 See para 5.2.2.1 above.
70 Snyman *Snyman's criminal law* 275-276.
71 *Twala* 869.
72 *Twala* 869.
73 *Zwane and Others* 253.

6.2.2 The offence of sedition versus offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004

The Protection of Constitutional Democracy against Terrorist and Related Activities Act (Terrorist and Related Activities Act) prohibits terrorist and related activities which are intended to achieve political and other aims in a violent or unconstitutional manner, and thereby undermine democratic rights and values and the Constitution.[74] The advantage of the offences listed under the Act is that they do not require more than one person acting in concert to commit the offence, as necessitated in the definition of sedition. One person can be held liable. The Act also provides that offences can be committed outside South-Africa in contrast with the common-law offence of sedition.[75]

Section 2 of the Terrorist and Related Activities Act states that any person who intentionally and unlawfully engages in "a terrorist activity"[76] is guilty of the offence of

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74 Protection of Constitutional Democracy against Terrorist and Related Activities Act Preamble.

75 See s 15 of the Act.

76 See s 1 of the Act: 'Terrorist activity' means – "(a) any act committed in or outside the Republic, which - (i) involves the systematic, repeated or arbitrary use of violence by any means or method; (ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to - (aa) any dangerous, hazardous, radioactive or harmful substance or organism; (bb) any toxic chemical; or (cc) any microbial or other biological agent or toxin; (iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons; (iv) causes serious risk to the health or safety of the public or any segment of the public; (v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private; (vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to - (aa) a system used for, or by, an electronic system, including an information system; (bb) a telecommunication service or system; (cc) a banking or financial service or financial system; (dd) a system used for the delivery of essential government services; (ee) a system used for, or by, an essential public utility or transport provider; (ff) an essential infrastructure facility; or (gg) any essential emergency services, such as police, medical or civil defence services; (vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or (viii) creates a serious public emergency situation or a general insurrection in the Republic, whether the harm contemplated in paragraphs (a) (i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (viii) was committed by way of any means or method; and (b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to - (i) threaten the unity and territorial integrity of the Republic; (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles, whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; and (c) which is committed, directly or indirectly, in whole or in part, for the

terrorism. The definition of what a 'terrorist activity' entails is extensive, since the lawmaker attempted to include a wide range of unlawful conduct. Section 3 of the Act establishes offences associated or connected with terrorist activities, while section 4 regulates offences associated or connected with the financing of specified offences. Section 14 provides that any person, who threatens, attempts, conspires with any other person, or aids, abets, induces, incites another person to commit an offence, is guilty of an offence. This section is similar to section 18 of the Riotous Assemblies Act 17 of 1956 which provides for the attempt, conspiracy and inducing another person to commit an offence. Conspiracy or incitement to commit sedition can be prosecuted under section 18 of the Riotous Assemblies Act.

Violent gatherings, damaging infrastructure, and defying or resisting the authority of the state may accordingly fall into both the definitions of a terrorist activity and that of sedition. Terrorist activities can also be read into the definitions of high treason and public violence depending on the circumstances and facts of the case. The conduct punishable in high treason, sedition, public violence, and the Terrorist and Related Activities Act may overlap, and it may be difficult to distinguish between these acts. Although the conduct of participants during violent gatherings may meet the requirements for prosecution under this Act and the offence of sedition, prosecution usually continues under the common-law offence of public violence,[77] or under section 18 of the Riotous Assemblies Act, as stated above. The conduct under the above-mentioned offences easily intertwines. For example, when the Sebokeng-community violently seized a sewer-plant in Gauteng, no worker was able to enter the plant for months since the community was protesting against the unavailability of jobs in the area.[78] As a result, thousands of litres of waste streamed into the Vaal River, and the whole river system was polluted.[79] The government needed billions to rectify the situation.[80] The elements of the above-mentioned offences can be read into these

purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.

77 See Chapter 5 above.

78 Tempelhoff https://www.pressreader.com/south-africa/beeld/20180927/28155229178 6492 (Date of use: 2 November 2020); Tempelhoff https://www.pressreader.com/south-africa/beeld/20180928/28148786727 9344 (Date of use: 2 November 2020).

79 Tempelhoff https://www.pressreader.com/south-africa/beeld/20180927/28155229178 6492 (Date of use: 2 November 2020); Tempelhoff https://www.pressreader.com/south-africa/beeld/20180928/28148786727 9344 (Date of use: 2 November 2020).

80 The South African Defence Force was deployed to guard the sewer-plant. The possibility exists that sewer-plants will be declared as national key points in terms of the National Key Point Act 102

facts.

Section 1(3) was included into the Terrorist and Related Activities Act in order to provide for the purposes of paragraph (a)(vi) and (vii) of the definition of terrorist activity, which states that:

> …any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (a) (i) to (v) of that definition, shall not be regarded as a terrorist activity within the meaning of that definition.[81]

Section 1(4) of the Terrorist and Related Activities Act again stipulates:

> Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, … shall not … be considered as a terrorist activity.[82]

It is clear that the government attempted to exclude all types of protest action or any disapproving or opposing conduct of political parties or groups from being criminalised as a terrorist activity by including section 1(3) and 1(4) in the Act.[83] However, service delivery protest action can be aimed to damage property and infrastructure, causing the destruction of natural resources or serious interference with essential services, while challenging the authority of the state. Harm is intended by the participants since it is their only means of assuring that the government pays attention to their grievances.[84] Section 1(3) and 1(4) are therefore not very helpful, and participants are still at risk of being prosecuted under the Act. Cachalia[85] criticises the vague and over-broad definition of what terrorist activities constitutes, and the government's attempt to exclude the acts of 'freedom fighters' from the ambit of the offence of terrorism.[86] The author is of the opinion that violence is not a requirement for a guilty-finding under the Act, since serious interference with essential services or causing major economic

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of 1980. See Tempelhoff https://www.pressreader.com/south-africa/beeld/20181214/281530817115056 (Date of use: 2 November 2020).

81 Terrorist and Related Activities Act s 1(3)(a)(vi), (vii).

82 Terrorist and Related Activities Act s 1(4).

83 In *S v Okah* 2018 SACR 492 (CC) paras [46]-[47], the court held that an evidentiary basis for reliance on the exemption must be placed before the court.

84 See para 5.4.2 above.

85 Cachalia 2010 *SAJHR* 511.

86 Cachalia 2010 *SAJHR* 511. See Lumina 2007 *AHRLJ* 35.

losses may not involve violent acts.[87] It is similar to the existing view that violence or threats of violence is not a requirement for a conviction on a charge of sedition in South Africa.[88]

With regard to the sentences prescribed for these offences, sedition seems not to be deemed as serious as the terrorist- and related activities offences. Section 51 of the Criminal Procedure Act 105 of 1997 (as amended) provides for discretionary minimum sentences for certain serious offences as contained in Schedule 2, Part I. When a person is convicted of any of the offences listed therein, he or she must be sentenced to life imprisonment. Part I does not provide for high treason or sedition, but does refer to offences in the Terrorist and Related Activities Act, in circumstances when it is proved that the offence has endangered the life, or caused serious bodily injury or the death of any person or group of persons, or caused serious risk to the health or safety of the public, or created a serious public emergency situation. In other circumstances, a first offender must be sentenced to imprisonment for a period not less than fifteen years; a second offender to imprisonment for a period of not less than 20 years, and a third or subsequent offender to imprisonment for a period not less than 25 years.[89] High treason and sedition falls under Part IV of Schedule 2, and provides for a sentence in the case of a first offender, to imprisonment for a period not less than five years, a second offender to imprisonment for a period not less than seven years, and a third or subsequent offender to imprisonment for a period not less than ten years.[90]

Although certain sections of the Terrorist and Related Activities Act, which overlap with the offence of sedition, safeguard acts which are committed in pursuance of protest, dissent or industrial action,[91] some seditious conduct during protest action still qualifies for prosecution under the Act.

87 Cachalia 2010 *SAJHR* 512.
88 See para 6.2.2.1 above.
89 Criminal Procedure Act s 51(2)*(a)*(i), (ii), (iii).
90 Criminal Procedure Act s 51(2)*(c)*(i), (ii), (iii).
91 Protection of Constitutional Democracy against Terrorist and Related Activities Act ss 1(3), 1(4).

6.3 Trespassing

In South Africa, there are different acts which govern eviction and occupation.[92] The Trespass Act 6 of 1959 prohibits unlawful entry or presence upon land and buildings. The Trespass Act covers trespassing in general on occupied and unoccupied land, or in buildings or parts of buildings. This Act focuses on trespassers who gather on land or in buildings before they are deemed to be unlawful occupiers. Currently, the Act is utilised as an important tool to combat violent protest action, land invasion[93] of state or private property, and to restore public order. Occupiers moving back into buildings after an eviction order was granted, illegal mining by Zama-Zama's,[94] and when perpetrators enter land or buildings to commit offences, are further examples of cases under the Trespass Act.

The Act does not differentiate between the motives why persons are trespassing. Communities or landless people often venture onto land belonging to municipalities, demanding space to build houses, to start building structures, or to show dissatisfaction with service delivery. Trespassing on land by communities can be politically motivated. From time to time, ruthless fraudsters instigate an invasion of land when they take advantage of the poor by selling stands on state property for small sums of money.

The English and Indian governments have created specific offences for the diverse problems experienced with trespassing. The aim of the legislation is to disperse crowds effectively; however, it must still be coupled with proper police training to make correct decisions. The question is therefore investigated whether it will be fruitful to create similar offences in the South African context. Although the police in South Africa

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92 See the Extension of Security Tenure Act 62 of 1997; the Land Reform (Labour Tenants) Act 3 of 1996; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and the Rental Housing Act 50 of 1999.

93 Definitions for land invasion and land grabbing in the South African context are not available. Both terms are used in the media and sometimes have the same meaning. 'Land invasion' includes "both state and privately-owned land unlawfully entered by people (who is destitute or do it purely for financial gain)". 'Land grab' is seen as more sinister. It is a "very large-scale land acquisition by means of nationalisation; it could involve abuses, force or violence." See South African Government https://www.gov.za/services/place-live/how-respond-land-invasion (Date of use: 22 November 2020).

94 This is a term referring to illegal miners on mine property where mining has been discontinued. Zama-Zama's are usually illegal in South Africa, and originate from Lesotho, Mozambique or Zimbabwe. When illegal miners need to be removed from mine property, the mine environment causes a serious security risk to mine personnel and the police.

receive some guidance from the Gatherings Act (which does not clearly state that it is applicable to trespassing scenarios) and the Police National Instructions, it is argued that incorporating police powers in the Trespass Act will assist the police to diffuse situations expediently.

6.3.1 Definition

Section 1 of the Trespass Act prohibits the entry or presence upon land or buildings in certain circumstances:

> (1) Any person who without the permission - (a) of the lawful occupier of any land or any building or part of a building; or (b) of the owner[95] or person in charge of any land or any building or part of a building that is not lawfully occupied by any person, enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.[96]

A person needs to be personally present on land or in a building or part of a building.[97] A person can be lawfully present in certain parts of a building but may have been denied access to other parts of the same building. Possible defences for trespassing on property include consent, a lawful reason, or necessity.[98]

The Trespass Act distinguishes between occupied and unoccupied land. Unoccupied land is, for example, land belonging to mines or companies. Section 1 determines that the permission of the lawful occupier, the owner, or the person in charge of land or a building or part of the building needs to be obtained. The lawful occupier's permission is required when land or a building or part thereof is occupied while the owner or person in charge of land or a building or part of a building that is unoccupied, must be obtained. The Trespass Act does not define a trespasser or occupier, but the Act is applicable to any persons present on land or in buildings without permission. Although the entering and being on land or in a building may take place with consent, when the permission is withdrawn, and the person fails to leave, he or she is deemed to be a trespasser. The Trespass Act is only applicable to trespassers who are not lawful or unlawful occupiers. It is, therefore, vital to establish if the trespasser is an occupier

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95 In terms of s 1(2) of the Trespass Act, a 'lawful occupier' in relation to a building or part of a building does not include a servant of the lawful occupier of the land on which that building is situated.

96 Trespass Act s 1.

97 Snyman *Snyman's criminal law* 488.

98 Snyman *Snyman's criminal law* 488-489.

before the Trespass Act can be applied. Different Acts in South Africa govern the position of trespassers, lawful occupiers or unlawful occupiers, which will subsequently be elaborated on.

6.3.1.1 The trespasser, lawful occupier and unlawful occupier

A lawful occupier, who is entitled to be on land in terms of the Extension of Security of Tenure Act 62 of 1997, has a lawful reason to enter, and be upon such land. The Extension of Security of Tenure Act's main function is to protect occupiers against unfair eviction. To 'evict' in this context means to:

> …deprive a person against his or her will of residence on land, the use of land and access to water which is linked to the right of residence.[99]

An 'occupier' is described as a person:

> …residing on land which belongs to another person and who has on 4 February 1997 or thereafter consent or another right in law to do so, but it excludes labour tenants or a person who use the land for industrial, mining, commercial purposes, or who earns more than R5000-00 on a monthly basis.[100]

The permission to be present on land can be expressed or implied. A lawful occupier, when his or her occupation is terminated, cannot be prosecuted under the Trespass Act. The rights of an unlawful occupier are protected by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (Illegal Eviction Act). This Act regulates the eviction of unlawful occupiers from land in a fair manner, while recognising the right of owners to apply for an eviction order at a court.[101] As such, in terms of the Illegal Eviction Act, an unlawful occupier who is already staying or occupying land in a building or structure[102] may only be removed with a court order. It constitutes an offence to evict an unlawful occupier without a court order.[103] Therefore, the police may not arrest an unlawful occupier under the Trespass Act.

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99 Extension of Security of Tenure Act Preamble, s 1. See also the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (Illegal Eviction Act) s 1 which defines the verb 'evict' as: "to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will".

100 Extension of Security of Tenure Act s 1. See the Illegal Eviction Act s 1 which delineates an 'unlawful occupier' as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act".

101 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act Preamble.

102 The Illegal Eviction Act s 1 states that a 'building or structure' includes "any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter".

103 The Illegal Eviction Act s 8. On conviction, a person is liable to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment.

Under the Trespass Act, a trespasser can be seen as somebody who is not a lawful or unlawful occupier of land or the building he or she is found on. The Trespass Act is not applicable if persons lawfully or unlawfully occupy land or buildings. Trespassing implies something temporary, before any structures are erected. The trespasser must know or foresee that he or she is entering the property of somebody else, and that he or she does not have permission to be there. The Trespass Act differs from other Acts in that a court that convicts a person under the Trespass Act, may "order the summary ejectment of that person from the building or land".[104]

This difference between a trespasser, occupier and unlawful occupier was discussed in *Economic Freedom Fighters and Others v Minister of Justice and Constitutional Development and Others.*[105] Prosecution against the applicant was instituted on three charges of incitement to trespass in contravention of section 1(1) of the Trespass Act. The applicant argued that when land is occupied by landless people, it falls outside the mandate of the Trespass Act,[106] since it must be read "subject to post Constitution eviction laws, including the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act and Extension of Security of Tenure Act".[107] The court was of the opinion that the relief sought by the applicant was a declaration that the Trespass Act is inconsistent with the Illegal Eviction Act and Extension of Security of Tenure Act when read in light of the section 39(2) of the Constitution.[108] In short, the applicant argued that the Trespass Act is unconstitutional or not applicable to land invasion, therefore, no offence was committed by the appellant. However, the court found that the Acts can exist together and complement each other.[109] In *Economic Freedom Fighters and*

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104 Trespass Act s 2(2).

105 *Economic Freedom Fighters and Others v Minister of Justice and Constitutional Development and Others* 2019 (2) SACR 297 (GP) (hereinafter *Economic Freedom Fighters* 2019).

106 *Economic Freedom Fighters* 2019 para [62].

107 *Economic Freedom Fighters* 2019 para [63].

108 Constitution s 39(2): "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." See para 2.2. above.

109 *Economic Freedom Fighters* paras [74]-[75]. See para [77]: "In the *Zwane*-case (*Zwane v S and Another* GP A 635/2016 (unreported judgment)), the appellant was convicted under section 1(1) of the Trespass Act after unlawfully entering a property that she had been lawfully evicted from under PIE. It would entirely defeat the purpose of Trespass Act and Prevention of Illegal Eviction from and Unlawful Occupation of Land Act if, following a lawful eviction, the appellant was allowed to re-enter the property and remain in unlawful occupation in perpetuity. Section 1(1) of the Trespass clearly applied as the appellant had re-entered and re-occupied the property without the permission of the complainant in order to thwart the eviction order."

Another v Minister of Justice and Correctional Services and Another,[110] the applicants contended that a proper interpretation of the Trespass Act in conjunction with the Illegal Eviction Act yield a meaning that effectively renders it impermissible to institute criminal charges, and a possible conviction flowing from an alleged violation of section 1(1) of the Trespass Act.[111] Nonetheless, the prayer for an order declaring that the Trespass Act does not apply to unlawful occupiers under the Illegal Evictions Act was refused.[112]

It would assist future cases in similar contexts as the afore-mentioned greatly if the difference between a trespasser, lawful occupier and unlawful occupier, and the purpose and reasons why different Acts are considered necessary to govern these situations, would be simplified. These terms create confusion, are difficult to understand and interpret – not only to the unrepresented accused, owner, lawful occupier and members of the public – but also to the police members who need to assist on the scenes.

6.3.2.2 Permission to enter in the Trespass and supplementary Acts

Section 1(1) of the Trespass Act indicates that a person requires permission to enter on land, or in a building, or in part of a building. The owner, the lawful occupier, or the person in charge may permit somebody to enter land, a building or part of a building; however, the permission may be revoked. The Trespass Act provides that a lawful occupier's servant cannot permit anybody to enter or be on land or in the building or part of a building.[113] Therefore, a servant cannot revoke permission previously given by the lawful occupier. It is suggested that the reference to 'servant' in this Act is outdated, and must be replace with the term 'employee'. It is important to identify the owner, lawful occupier or person in charge, since this person's statement is required before any prosecution can be instituted.[114]

There are other Acts also prohibiting access to certain places that may supplement the Trespass Act. Access to gather can be denied to groups and participants at these

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110 *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25 (hereinafter *Economic Freedom Fighters* 2020).
111 *Economic Freedom Fighters* 2020 para [73].
112 *Economic Freedom Fighters* 2020 2.
113 Trespass Act s 1(2).
114 Snyman *Snyman's criminal law* 488.

specific places. The Control of Access to Public Premises and Vehicles Act 53 of 1985 provides for the safeguarding of certain public premises, vehicles and people. It is applicable to certain airports in South Africa.[115] The owner[116] of any public premises[117] or public vehicle[118] may take steps considered necessary for the safeguarding of the premises or vehicle, and for the protection of people. He or she can direct that the premises or the vehicle may only be entered with the permission of an authorised officer.[119] For the purpose of granting permission, an authorised officer may require the person to furnish his or her name, address, and any other relevant information.[120] Without prejudice to the provisions of the Trespass Act, an authorised officer may remove any person from any public premises or public vehicle if that person enters without permission or fails to observe a condition.[121] The sentence prescribed is similar to that under the Trespass Act.[122]

The National Key Points Act 102 of 1980 regulates security at national key points. If it appears to the Minister, in terms of the National Key Points Act, that a place or area is important, and that its "loss, damage, disruption or immobilisation may prejudice the Republic or is necessary or expedient for the safety of the Republic or in the public interest,"[123] he or she may declare that place or area a national key point.[124] The Act places a duty on the owner of the national key point to take steps to safeguard the area to the satisfaction of the Minister,[125]which includes that permission needs to be obtained before accessing the place or area. A person who obstructs the owner in taking any steps required to effectively securing the key point, is on conviction liable to a fine not exceeding R10 000, or to imprisonment for three years, or to both such fine and imprisonment.[126] Trespassers found on the key point will be prosecuted under

115 Control of Access to Public Premises and Vehicles Act s 2.
116 Control of Access to Public Premises and Vehicles Act s 1 defines an 'owner of any public premises or any public vehicle' to mean "the head of the department of State, division, office or other body which occupies or uses those premises or that vehicle or is in charge thereof, as the case may be".
117 See Chapter 3 footnote 235 for the definition of 'public premises'.
118 See Chapter 3 footnote 235 for the definition of 'public vehicle'.
119 According to the Control of Access to Public Premises and Vehicles Act s 1, an 'authorised officer' constitutes "any person authorised by the owner of any public premises or any public vehicle to act in terms of the provisions of section 2".
120 Control of Access to Public Premises and Vehicles Act s 2(2)(a).
121 Control of Access to Public Premises and Vehicles Act s 2(3)(b).
122 The Trespass Act s 4 states that a person is liable on conviction to a fine not exceeding R2000, or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment.
123 National Key Points Act s 2.
124 National Key Points Act s 2.
125 National Key Points Act s 3.
126 National Key Points Act s 10.

the National Key Point Act. The Critical Infrastructure Protection Act 8 of 2019 was ascended to with the aim to repeal the National Key Points Act.[127] The new Act was regarded as necessary to provide for measures to be put in place for the protection, preservation and durability of critical infrastructure. This Act may play a role in protecting buildings, installations, pipelines, premises, systems, transport networks or networks for the delivery of electricity or water,[128] from being damaged or destroyed during protest action.

The Safety at Sports and Recreational Events Act 2 of 2010 focuses on the welfare of persons and property at public events. These events may include, amongst others, sporting, entertainment, recreational, religious, cultural or similar activities hosted at a stadium, venue or along a route, for which spectators are paying.[129] Section 44(1)(s) of the Act prohibits the entry into:

> …a designated area or traffic free zone inside a stadium, venue or route or its respective precincts, without the prior written authorisation of a controlling body, event organiser or stadium or venue owner.

Upon convicted of contravening this Act, a person is liable to a fine or imprisonment for five years, or to both a fine and imprisonment.[130]

6.3.2 Facilitation of trespassers

The Trespass Act in South Africa provides for one general offence to prosecute persons trespassing. The Act does not include the duties or the powers of the police. Yet, problems are experienced with trespassing occur daily in South Africa, as mirrored by the facts in *Ego Gardens Pty Ltd and Others v Minister of Police and Others*.[131] In this case, the applicants (companies or close corporations) sought to protect unfenced property on undeveloped land. A large crowd of more than 1000 persons gathered on the property and registered for spaces to build, while a small

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127 Critical Infrastructure Protection Act 8 of 2019, assented to 20 November 2019, date of commencement needs to be proclaimed.

128 Critical Infrastructure Protection Act s 1. Basically, the government will be able to declare sewer-plants as critical infrastructure.

129 See Safety at Sports and Recreational Events Act s 1.

130 Safety at Sports and Recreational Events Act s 44(2).

131 *Ego Gardens Pty Ltd and Others v Minister of Police and Others* Case no 19186/2018, Gauteng Division High Court, Pretoria (unreported) (hereinafter *Ego Gardens*). Also see Otto https://www.pressreader.com/south-africa/beeld/20180405/281629600835467 (Date of use: 2 November 2020).

group of persons were demarcating stand size portions.[132] The applicants were informed that the land was being expropriated without compensation and distributed to individuals.[133] The applicants approached the local police station for assistance to remove the trespassers. The police were unresponsive, and refused to attend to the complaint and to stop the trespassers, or to open a docket. The reason for this refusal was that the names of the trespassers were not provided to them.[134] The applicants were of opinion that the police failed to act in accordance with the National Police Instruction 7 of 2017. Part of the relief the applicants sought were the names and contact numbers of designated police officers at the public order policing unit or local police station to be contacted in situations of public violence or trespassing. The police submitted that the public order policing unit was not locally available, that no local member was tasked with these matters, and that any assistance to the public will depend on the available resources of the local police.[135] The police's supposition was that since the applicants could not identify the trespassers, they could not be assisted or the participants arrested.

The National Police Instruction 7 of 2017 provides for directives on unlawful occupation[136] of land and evictions. The instruction places a duty on land owners and occupiers to report incidents of land invasions and illegal evictions to their nearest police stations.[137] When laying a complaint, the complainants must submit an affidavit with the following information: (i) whether the complainant is the owner, lawful occupier or person in charge of the property; (ii) particulars of the suspect(s) who entered the property; (iii) whether the owner, lawful occupier or person in charge gave permission to the suspect(s) to enter the property; and (iv) whether the suspect(s) have any lawful reason for entering the property.[138] When a building or structure has been erected on land and it is inhabited, the person is considered to reside on such land.[139] It is a factual question how long the person was residing or staying on the terrain. If the suspects have been residing on the property, the owner must be advised that the

132 *Ego Gardens* para [3].
133 *Ego Gardens* para [4].
134 *Ego Gardens* para [4].
135 *Ego Gardens* para [8].
136 According to the National Police Instruction 4, an 'unlawful occupier' is "a person who occupies and resides on land without the express or tacit consent of the owner or person in charge".
137 *Ego Gardens* para [2].
138 National Police Instruction 7.
139 National Police Instruction 7.

trespassers should be evicted by means of a court order.[140] However, a person who is still in the process of erecting a building or structure and not inhabiting the building or structure is not residing, and is still seen as a trespasser.[141] Trespassers must be arrested as soon as possible after a complaint of trespassing was lodged, and must be brought before a court.[142] If persons are found on the land or premises that are in the process of erecting buildings or structures for habitation or threatening to erect such buildings or structures, the police member at the scene must inform them that they are trespassing, and that they will be arrested if they do not leave the land or premises immediately.[143] If the trespassers refuse to leave the land or premises, they must be arrested in order to stop them from continuing to commit the offence of trespassing.[144] If information exists under oath that persons are conspiring to invade land, the persons can be arrested in terms of section 18(2)(a) of the Riotous Assemblies Act.[145]

Although the National Police Instruction 7 of 2017 guides police members as to possible unlawful occupation, owners or lawful occupiers encounter problems in that most instances of trespassing constitutes a danger of unlawful occupation. Owners are particularly powerless when crowds trespass on their property. They cannot remove these masses with force, and need the police to assist them. The availability of resources at local police station hampers the arrest or removal of these participants. Owners are furthermore usually caught off guard by trespassers; therefore, in most instances, they will not know the identities of the trespassers. Additionally, it will be impossible to identify each participant if hordes of people move onto land. Owners or lawful occupiers will not be able to submit the identities of the suspects in an affidavit to the local police station.

Frequently, the boundaries between land belonging to the state, municipalities, businesses or private owners are blurred, preventing the police to react. The police must hence receive the necessary support to be able to establish ownership of land. A further dilemma exists when the trespassers cannot be served with civil court

140 National Police Instruction 7.
141 National Police Instruction 5.
142 National Police Instruction 7.
143 National Police Instruction 11.
144 National Police Instruction 11.
145 National Police Instruction 10-11.

documents because the participants are not discernible. Participants of such gatherings may vary from day to day, or from hour to hour. The owner may obtain an interdict to prevent identified persons or groups from trespassing on land, yet, the following day or a few hours later, other persons could be trespassing. It is problematic to prove that there is a connection between the persons mentioned in the court order and the new trespassers, or that the new trespassers were informed of the existence of the court order.

When trespassers commence to occupy land, a slow and costly court process is necessary for eviction. It is, therefore, important that the police are able and well-informed to act properly in all circumstances. It seems that the police on local level do not possess the knowledge or resources to facilitate trespassers. When the public order policing unit arrives much later, trespassers may already be deemed occupiers. In practice, the police will not remove unlawful occupants, and eviction must first proceed in terms of the Illegal Eviction Act. A sheriff must carry out an order for eviction, demolition or removal.

Unlawful occupiers may furthermore move back into the building or land after being evicted, but the police may lack the knowledge that these persons are now deemed to be trespassers, and can be arrest for trespassing.[146] When gatherings on another's land are peaceful, the police usually allow the gatherings to continue, however, depending on the circumstances, they may also be dispersed.[147] However, trespassers and owners may be uncertain what is to be expected from the police. Section 9 of the Gatherings Act provides, *inter alia*, that a member of the police may call upon the persons participating in the gathering to disperse, by obtaining their attention and in a loud voice order the participants to disperse within a time specified.[148] If they do not adhere to the order, the police may arrest them. Typical

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146 In *Zwane v S and Others* the court dealt with a constitutional challenge to s 2(2) of the Trespass Act. The argument was that it allowed for "eviction by the back door". The court found that there is no merit in this submission. The section merely confers discretion to a court that it *may* make an order for summary ejectment. See *Economic Freedom Fighters* 2019 paras 78-79.

147 See Chapter 5 above.

148 Gatherings Act s 9(1)(f). According to the National Instructions 4 of 2014 para 14 – "the warning must be audible and must include the action that will be taken against them, and is applicable should defensive measures fail. The warning should, if the circumstances permit, include an explanation of the steps that are going to be taken to disperse the crowd and should give the participants enough time to disperse peacefully; yet, the time should not be so long that it gives the participants the impression that the police are not serious. In cases of violence immediate action may be required. A second warning must be given in at least two official languages and if

defences of trespassers are that they did not realise it was private or municipal land; that the land was not fenced; there were no warning signs erected; the land was used by the community as a walk-through or playground for children; they were just walking past; intimidated to participate; or that the stands were sold to them.

The facilitation of trespassers by the police represents a major problem in South Africa, as evidenced by the criticism evoked from Legodi JP for the unsatisfactory manner in which the Mpumalanga police handled trespassers, which is against their constitutional obligation:

> …to prevent, combat, investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, uphold and enforce the law.[149]

The High Courts have received numerous applications for orders restricting groups and participants to commit acts of protest, trespassing or public disorder. In *Impangele Logistics (Pty) Ltd and Another v All Truck Drivers' Foundation (ATDF) and Others*[150] and *Mbali (Pty) Ltd v Ntuthuko Buthelezi and Others,*[151] relief was granted against the respondents from unlawfully damaging, obstructing, interfering or trespassing in and on the businesses of the applicants.[152] The court mentioned that:

> …it is not the responsibility of the courts to prevent, combat or investigate crimes. Neither is it the function of the courts to maintain public order.[153]

The court was concerned with the question whether the training offered to the police is sufficient, or if the police are merely neglecting their duties. The court held that there is no justification to let people take the law into their own hands simply because there are deficient police resources.[154]

It therefore seems that the Trespass Act is not adequate to deal with the current circumstances surrounding trespassing. A member of the public will find it challenging to access the Gatherings Act or the National Police Instructions in order to establish

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possible also in the language that is most commonly spoken in that area before the commencement of the offensive measures, giving innocent bystanders the opportunity to leave the area. In cases where violence has already started the time frame should be shortened immediately".

149 See s 205(3) of the Constitution.

150 *Impangele Logistics (Pty) Ltd and Another v All Truck Drivers' Foundation (ATDF) and Others* (3647/2019) [2019] ZAMPMHC 11; 2020 (1) SACR 536 (hereinafter *Impangele Logistics*).

151 *Mbali (Pty) Ltd v Ntuthuko Buthelezi and Others* Case no 3564/2019, Mpumalanga High Court Division.

152 *Impangele Logistics* paras [9]-[10].

153 *Impangele Logistics* para [17].

154 *Impangele Logistics* para [29].

what the duties or powers of the police entail. In England, for example, offences were created for different unique problems, and legislation provides for the duties or powers of the police in different situations. The police play a leading role to diffuse situations of public disturbance and trespassing. Similar legislation in South Africa can equip the police to take correct and firm steps to solve and diffuse, specifically, land invasion matters.

6.3.4 Trespassing in England and in India

As afore-mentioned in paragraph 6.3 above, the jurisdictions of England and India may assist South Africa in improving their legislation on trespassing. These foreign laws will subsequently be discussed.

6.3.4.1 England

In England, legislation provides for offences covering different scenarios which cause problems in their own context, while in South Africa, the Trespass Act has to deal with all forms of trespassing conduct.[155] The English legislation centres on the police to firstly diffuse volatile situations, and then if the participants do not adhere to the police's instructions, to proceed with arrest. Provision is made for the steps to be taken by the police, and in most instances it is required that a senior police official takes the decisions.

6.3.4.1.1 *Power to remove trespassers on land*

If a senior police officer reasonably believes that two or more persons are trespassing[156] on land with the common purpose of residing on the land, and that reasonable steps have been taken by the occupier[157] to request them to leave, and the trespassers caused damage to the land, or used threatening or insulting words or behaviour towards the occupier or have six or more vehicles between them, he can

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155 See Glazebrook *Blackstone's statutes on Criminal law* 211-214.

156 In terms of s 61(7)(a) of the Criminal Justice and Public Order Act 1994, references to trespassing or trespassers were "references to acts and persons doing acts which constitute either a trespass as against the occupier or an infringement of the commoners' rights".

157 In terms of the Criminal Justice and Public Order Act s 61(7)(b), references to the occupier included "the commoners or any of them or, in the case of common land to which the public has access, the local authority as well as any commoner".

order them to leave the land and to remove any vehicles[158] or property.[159] It constitutes an offence if a person, knowing that the police gave this order, fails to leave the land as soon as reasonable. Trespassers are given an opportunity to rectify their conduct before criminal steps are applicable. When a trespasser adheres to the order but after having left, again enters the land as a trespasser within the period of three months, he or she also commits the offence. A person is liable on summary conviction to imprisonment not exceeding three months or a fine not exceeding (£2,500) on the standard scale, or both.[160]

It is interesting to note that the occupier needs to take reasonable steps to ask trespassers to leave. This section also provides for a period of three months during which the trespasser may not enter the specific land again. A similar provision can be fruitfully applied in land invasion or illegal mining situations in South Africa. However, it will necessitate that the police keep proper record of persons who entered land, and were ordered to vacate the land. Trespassers should also be given an opportunity to rectify their conduct before criminal steps are applicable.

6.3.4.1.2 *Powers to remove persons attending or preparing for a rave*

The case of *R v Carling*[161] is an example of the security risk and damage that can be caused by a rave.[162] In this case, numbers of participants gathered in the woods, abandoned their vehicles, and blocked driveways. The crowd attacked the police and the site was left in a state of mess with broken glass, litter and human excrement, costing £4,000 to clean up. The police operation lasted three days.

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158 'Vehicle' includes – "(a) any vehicle, whether or not it is in a fit state for use on roads, and includes any chassis or body, with or without wheels, appearing to have formed part of such a vehicle, and any load carried by, and anything attached to, such a vehicle; and (b) a caravan as defined in section 29(1) of the Caravan Sites and Control of Development Act 1960". See Criminal Justice and Public Order Act s 61(9).

159 Section 61(1) of the Criminal Justice and Public Order Act 1994, Part V Public Order: Collective Trespass or Nuisance on land, Powers to remove trespassers on land.

160 Criminal Justice and Public Order Act s 61(4). Section 61(6) determines that "it is a defence for the accused to show that he was not trespassing on the land, or that he had a reasonable excuse for failing to leave the land as soon as reasonably practicable or, as the case may be, for again entering the land as a trespasser".

161 *R v Carling* [2016] EWCA Crim B1.

162 According to the Criminal Justice and Public Order Act s 63(1), a 'rave' constitutes "a gathering on land in the open air of 100 or more persons (whether or not trespassers) at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at which it is played, is likely to cause serious distress to the inhabitants of the locality".

The police's powers under the Act not only include removing persons attending a rave but also persons preparing for a rave. A police officer of the rank of superintendent, who reasonably believes that two or more persons are preparing to hold a rave, or ten or more persons are waiting for the rave to start, or when ten or more persons are attending the rave, can order the participants to leave the land, and remove their vehicles and property.[163] A person knowing that an order has been given, and who fails to leave the land as soon as reasonable, or having left, and trespass on the land again within seven days, commits an offence, and is liable on summary conviction to imprisonment not exceeding three months or a fine not exceeding (£2,500) on the standard scale, or both.[164] It is also an offence, if a person knowing that such an order was given, prepares or attends such a gathering within 24 hours after the order was given.[165] A constable can enter the land if the participants failed to adhere to the order, to seize and remove vehicles or sound equipment.[166] A constable, can if he or she reasonably believes that a person is on his or her way to a rave in relation to which an order is applicable, stop the person, and direct him or her not to proceed in the direction of the gathering.[167] This power may only be applied within five miles of the location of the rave. If a person does not adhere to this instruction, he or she commits an offence, and is liable on summary conviction to a fine not exceeding (£1,000) on the standard scale.[168]

A similar offence providing for raves do not exist in South Africa. However, comparable legislation can contribute especially in situations where persons invade land belonging to local authorities or private owners. Gathering' participants are frequently transported with minibuses and buses, the costs funded by councillors or influential businessmen, who gain politically or financially. Legislation in South Africa providing that the police may direct or stop potential trespassers not to proceed further can contribute to minimising the impact of facilitating and moving large crowds. To attach an ambit from the location of the gathering not to proceed further, can assist to manage risks. A time frame when a trespasser may not go back to the land, can also be effective in cases of illegal mining or land invasion. Implementation of similar legislation in South Africa,

163 Criminal Justice and Public Order Act s 63.
164 Criminal Justice and Public Order Act s 63(6).
165 Criminal Justice and Public Order Act s 63(7A-B).
166 Criminal Justice and Public Order Act s 64.
167 Criminal Justice and Public Order Act s 65.
168 Criminal Justice and Public Order Act s 65(4).

in the current climate of promises of land exploration, may be met with distrust. However, it is necessary to clearly map out the powers of the police and the consequences if participants of land invasion do not adhere to their orders. Land invasion counters the orderly awarding of stands and services rendered by municipalities. Therefore, similar legislation in the South African context will be essential to fulfil the promise of land. Police powers and proper training in these matters will be vital since the police need to play an active role in the stability of the communities they serve.

6.3.4.1.3 Aggravated trespass

A person commits the offence of aggravated trespass, when he or she trespasses in the open air on land[169] to intimidate persons who are engaging in a lawful activity.[170] On conviction, a person is liable for a period not exceeding three months or a fine not exceeding (£2,500) on the standard scale, or both.[171] A senior police officer, who reasonably believes that a person is committing, or intending to commit the offence, or that two or more persons are trespassing with the common purpose of intimidating persons to discourage them from engaging in a lawful activity, may order them to leave the land.[172] When a person knowing that such an order is in place, fails to leave the land as soon as practicable, or having left, again enters the land within three months, he or she commits an offence.[173]

These provisions were created to cater for problems experienced in England. Similar legislation in South Africa may assist with problems presently experienced with groups intimidating businesses. Their unlawful conduct harms businesses, and has a serious economic implication. Perpetrators must, therefore, be informed what conduct is unacceptable and that they risk to be arrested if they do not adhere to the instructions of the police.

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169 Section 61 of the Criminal Justice and Public Order Act 1994. In terms of subsection (5), land does not include the highways and roads excluded from the application of s 61.

170 Criminal Justice and Public Order Act s 68(1).

171 Criminal Justice and Public Order Act s 68(3).

172 Criminal Justice and Public Order Act s 69(1).

173 The person is liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding (£2,500) on the standard scale, or both. See Criminal Justice and Public Order Act s 69(1).

6.3.4.1.4 *Trespassory assemblies*

The chief officer of the police can, when he or she reasonably believes that an assembly is to be held on private land[174] without the permission of the occupier[175] which may result in serious disruption to the community, or when the land, building or monument is of historical, architectural, archaeological or scientific importance, and significant damage can be caused, apply to the council of the district for an order prohibiting the assembly for a specified period. The Commissioner of Police for the City of London with the consent of the Secretary of State may also prohibit trespassory assemblies for a stipulated period in London.[176]

A person organising a prohibited gathering, when knowing it is prohibited by such an order, is guilty of an offence,[177] and liable on conviction to imprisonment for a term not exceeding three months or a fine not exceeding (£2,500) on the standard scale or both.[178] A person who takes part in a prohibit assembly, knowing it is prohibited by an order, is guilty of an offence,[179] and is liable on conviction to a fine not exceeding (£1,000) on the standard scale.[180] If a constable reasonably believes that an assembly is prohibited by an order, and believes that a person is on his or her way to the gathering, he or she may stop that person, and order him or her not to proceed in the direction of the assembly.[181] A person who fails to comply with such an order is guilty of an offence.[182]

These provisions can be successful applied in the South African context, since the Gatherings Act is not very effective in prohibiting gatherings.[183] In South Africa, without receiving a formal complaint from an owner, the police will not on their own accord involve themselves when trespassers invade land. To ensure proper land distribution in the future, the police will need to play a more active role in guaranteeing property

174 'Land' means "land in the open air"; see Criminal Justice and Public Order Act s 14A(9), and also the definition for ss 14B and 14C.
175 'Occupier' means "(a) in England and Wales, the person entitled to possession of the land by virtue of an estate or interest held by him".
176 Criminal Justice and Public Order Act s 14A(4).
177 Criminal Justice and Public Order Act s 14B(1).
178 Criminal Justice and Public Order Act s 14B(3).
179 Criminal Justice and Public Order Act s 14B(2).
180 Criminal Justice and Public Order Act s 14B(6).
181 Criminal Justice and Public Order Act s 14C(1).
182 Criminal Justice and Public Order Act s 14C(3).
183 See Chapter 4 above.

rights. A similar provision where a senior police member may apply to a local magistrate for an order prohibiting a gathering on private land for a specific period, can assist to properly facilitate risks.

6.3.4.1.5 Squatters

Section 6 of the Criminal Law Act 1977 prohibits a person to use violence to secure entry into premises. It constitutes an offence if trespassers fail to leave a premise after being requested to do so by an occupier.[184] A person is liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding £5,000 on the standard scale or to both.[185]

Similar legislation in South Africa can assist in situations where the community helps to reinstate[186] a person who was evicted from a premise by a court order. Frequently, the owner is left without any further remedy. This offence may also be fruitfully applied when community members decide to take the law into their own hands against suspected drug dealers or human traffickers. Participants of certain gatherings use or threaten violence against foreign nationals, entering houses or shops, to search for any illegal items or persons.

6.3.4.1.6 *Powers to remove unauthorised campers*

The local authority can remove persons residing in a vehicle, near highways, unoccupied land, or on occupied land without the consent of the occupier. The local authority must order them to leave the land, and remove the vehicle or any property.[187] Notice of such an order must be served on the persons.[188] If a person knowing that a direction has been given fails to adhere to it, or enters the land within the period of three months, an offence is committed.[189]

Local authorities in South Africa experience difficulties with an unregulated influx of people occupying municipal land. However, since the Extension of Security Tenure

184 Criminal Justice and Public Order Act s 7.
185 Criminal Justice and Public Order Act s 6(5).
186 By breaking open the premises, and carry possessions back.
187 Criminal Justice and Public Order Act s 77(1).
188 Criminal Justice and Public Order Act s 77(2).
189 Criminal Justice and Public Order Act s 77(3).

Act and the Illegal Eviction Act must deem such persons as either a lawful or unlawful occupier, a costly eviction process must be followed.[190]

6.3.4.2 India

In India, trespass is classified in five categories, i.e. criminal trespass, house trespass, lurking house trespass, house-breaking and house-breaking by night.[191] The first two categories show some similarities with the South-African trespass offence, and will be discussed below.

6.3.4.2.1 Criminal trespass

A person who enters a property with the intent to commit an offence or to intimidate, insult, or annoy a person, commit the offence of criminal trespass.[192] The person is liable with imprisonment which may extend to three months, or with a fine which may extend to five hundred rupees, or with both.[193]

There must be an unauthorised entry into or upon another's property or an authorised entry but an unlawful occupancy with the intention to commit an offence or to intimidate, insult or annoy the person in possession of the property.[194] The offence of criminal trespass does not only require entering with the intention to commit an offence, but also provides for circumstances which do not always construe an offence, such as intimidating, insulting or annoying the person in possession of the property.

6.3.4.2.2 House trespass

A person who enters or remains in any building, tent, or vessel used as a dwelling, or building used as a place for worship, or a place for the custody of property, commits an offence.[195] The person is liable with imprisonment of one year, or with a fine which may extend to one thousand rupees, or with both.[196] The introduction of any part of

190 See para 6.3.2 above.
191 Indian Penal Code 1340.
192 Section 441, Indian Penal Code 1339-1347.
193 Section 441, Indian Penal Code 1339-1347.
194 Indian Penal Code 1341.
195 Section 442 Indian Penal Code 1343.
196 Indian Penal Code 1347.

the trespasser's body is seen as entering and sufficient to commit the offence.[197] This offence is specifically applicable to human dwellings, places of worship or property storage spaces. The Trespass Act in South Africa is more general and does not provide for specific categories. It would perhaps be wise for the legislature to create similar types of offences for South Africa's unique problems, with applicable and different sentences fitting the crime. The legislation should also provide for the powers of the police in each situation in order to diffuse and disperse crowds effectively.

Although cases of trespassing are generally deemed as minor in South African criminal courts, such cases may be time-consuming. The non-availability of the trespassers and their legal representatives, especially in land invasion circumstances, may strain the court roll for years. Community members may attend the court in numbers in support of the accused, causing a secondary security risk, renewed protest action outside courts, and witnesses to fear retaliation. The adoption of offences for different trespassing scenarios may assist to finalise cases more speedily in courts. Restorative justice outcomes can also play a positive role.

6.4 Incitement under the Riotous Assemblies Act

Incitement of participants by their leaders during a gathering is part and parcel of protest action. Incitement under the Riotous Assemblies Act 17 of 1956 does not require that the conduct must take place during a gathering; still, in reality, an audience is usually present to adhere to the calls to commit public violence, or to do or not to do something. Incitement taking place over social media seems to be a future trend. The High Court and Equality Court in *South African Human Rights Commission v Velaphi Khumalo and Others*[198] recognised that people are susceptible to being stirred up by inflammatory talk online.[199]

Not only does the Riotous Assemblies Act provide for the common-law offence of incitement to public violence, the Act also establishes a statutory offence, i.e.

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197 Indian Penal Code 1434.

198 *South African Human Rights Commission v Velaphi Khumalo and Others* 2019 (1) SA 289 (GJ) (hereinafter *Khumalo*).

199 *Khumalo* paras [90]-[95]. In para 103, it is stated: "these utterances … could indeed, be construed to incite the causation of harm".

incitement to commit an offence under section 18(2)(b) of the Act.[200] Section 17 of the Act confirms the circumstances in which the common-law offence of incitement to perpetrate public violence are deemed to be committed. Section 18 provides for the attempting, conspiring or inducing of another person to commit an offence. Although the offence of incitement is a useful tool to deter leaders from inciting their supporters to commit criminal deeds, the Riotous Assemblies Act is clouded in controversy, and seen as "stemming from apartheid-era law, out-dated and historically used to prosecute liberation fighters."[201]

For the purposes of these sub-paragraphs, the term 'incitement' is commonly used for the following verbs: inciting, instigating, commanding, or procuring any other person to commit an offence. This sub-paragraph focuses on the incitement of participants of a gathering to commit offences. Incitement to commit murder (when individuals or hit men are paid to kill) is usually a straightforward case for the prosecution, and depends on the facts of each case. However, when political leaders incite their supporters, it is difficult to distinguish between heated political rhetoric, utterances prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, or incitement to commit offences. Sometimes all of above acts overlap.[202] Constitutional rights are not absolute. To enjoy these rights, responsibility is required from leaders whose utterances can be acted upon by their followers.[203] Leaders ought to bear heavier responsibility than others to help preserve "*ubuntu*, justice, equality-based heritage and shared aspirations".[204]

Although the Riotous Assembly Act is seen as stemming from apartheid-era law, it is still relevant today and utilised in courts. The court in *Economic Freedom Fighters and Others v Minister of Justice and Constitutional Development and Others*[205] declared that when the Act was enacted, it was truly deplorable times in South Africa's history, however, it is of little value in determining whether the Act is unconstitutional or not.

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200 *R v Nlhovo* 1921 AD 485; *Economic Freedom Fighters* 2020 para [78]. Parliament has 24 months to rectify the constitutional defect; during this period s 18(2)(b) of the Riotous Assemblies Act will read: "any person who - (b) incites, instigates, commands, or procures any other person to commit, any [serious] offence" - judgment was given 27 November 2020.

201 Most of the Act was repealed.

202 *Afri-Forum and Another v Malema and Others* 2011 (6) SA 240 (EqC). In the *Khumalo*-case paras [113]-[114], the court decided to refer the matter to the NDPP to consider possible prosecution.

203 *Economic Freedom Fighters* 2020 para [3].

204 *Economic Freedom Fighters* 2020 para [3].

205 *Economic Freedom Fighters* 2019 297.

The Act must still conform to the rights as guaranteed in the Constitution as well as to applicable regional and international instruments,[206] which will be examined below.

6.4.1 Guiding principles on incitement to commit violence

International and regional instruments, for example, the ICCPR and the ECHR state that incitement of violence, discrimination, or hostility must not be allowed. Such conduct is excluded from the protection of these instruments. In this regard, the *Guidelines on freedom of association and assembly in Africa* specifies that:

> …the expression aimed at in and through assemblies is protected by the right to freedom of expression, and includes expression that may give offense or be provocative. Hate speech and the incitement of violence are not protected and shall be prohibited.[207]

Additionally, article 20 of the ICCPR provides that:

> Any propaganda for war shall be prohibited by law … Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[208]

A similar provision is discernible in the *Guidelines on freedom of peaceful assembly,* in affirming that:

> While expression should normally still be protected even if it is hostile or insulting to other individuals, groups or particular sections of society, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law [209]

Section 10 of the ECHR asserts that everyone has an inherent right to freedom of expression, but although this right includes certain freedoms, it likewise holds obligations and accountabilities for the right holder:

> This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers … The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

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206 See Chapter 2 above.
207 ACHPR *Guidelines on freedom of association and assembly in Africa* para [78].
208 South Africa signed the Covenant in 1994, and ratified it in 1998. The Optional Protocol to the ICCPR was ratified by South Africa in 2002. See UN https://indicators.ohchr.org/ (Date of use: 8 July 2020).
209 *Guidelines on freedom of peaceful assembly* 2010 para [96].

> protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[210]

It is a well-known fact that governments must ensure that national legislation complies with international human rights norms. The incitement of violence is commonly part of different crimes, for example, public violence, hate speech, intimidation, or genocide, and can be utilised to destabilise the democracy of a country. Most countries recognise the danger of inciting people to commit violent acts since violent conduct generally translates into crime. Domestic laws to curb incitement of violence before the actual offences take place is important in order to preserve peace and order. For example, in New Zealand, the New Zealand Offences against Public Order provides that:

> Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.[211]

There is a fine line between heated political rhetoric and incitement to commit violence. Furthermore, the freedom of expression is protected in most constitutions, as such, criminal offences to curb incitement of violence must be carefully considered.

6.4.2 Freedom of expression

The right to freedom of expression is guaranteed by section 16 of the Constitution,[212] except in instances of "propaganda for war, incitement of imminent violence and advocacy of hatred that is based on race, ethnicity, gender or religion that constitutes incitement to cause harm".[213] The purpose of section 16 of the Constitution was elaborated on in the case of *Islamic Unity Convention v Independent Broadcasting Authority:*[214]

> Section 16 is in two parts. Subsection (1) is concerned with expression that is protected under the Constitution. It is clear that any limitation of this category of expression must satisfy the requirements of the limitations clause to be

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210 ECHR s 10.

211 Summary Offences Act 1981 s3 as amended.

212 Section 16(1) of the Constitution provides that: "(1) Everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research".

213 Constitution s 16(2).

214 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

> constitutionally valid. Subsection (2) deals with expression that is specifically excluded from the protection of the right… Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend… Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm... There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression.[215]

The Constitution qualifies incitement of violence by requiring that the violence must be imminent. The descriptive 'imminent' means "something that is certain to happen very soon".[216] Therefore, if the government enacts legislation to prohibit conduct falling within section 16(2) of the Constitution, for example, not to incite imminent violence, it will not be seen as unconstitutional. However, not any violence will suffice, it must be threatening, i.e. conduct to be happening soon. The 'imminent' element displays some resemblance with the definition of the common-law offence of assault which provides that the unlawful and intentional act or omission must inspire:

> …a belief in another person that such impairment of his bodily integrity is immediately to take place.[217]

Therefore, if there is no physical impact, there must be a threat of immediate personal violence in circumstances that lead the reasonable person to believe that the perpetrator intends and has the ability to immediately carry out the threat.[218] The Constitution, however, does not refer to 'personal violence', only to 'imminent violence'. As a result, violence can be aimed at a person or property, however, the circumstances must induce the reasonable person to be certain that the violence will take place immediately or very soon. In this regard, peaceful stands in contrast to violence, as violence entails the "use of physical force that is likely to result in injury or death or serious damage to property".[219]

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215 *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) paras [31]-[33].

216 Pearsall (ed) *Concise Oxford English Dictionary* "imminent".

217 Snyman *Snyman's criminal law* 395. See the definition of assault in footnote 145 in Chapter 5 above.

218 Snyman *Snyman's criminal law* 397-398.

219 ICCPR *General Comment* para [15]. See also footnote 15 in Chapter 3 above.

Section 16(2) of the Constitution does not constitute a limitation of free expression, and the section cannot have any role to play in determining what constitutes a reasonable and justifiable limitation of free expression.[220] Legislation may venture across the boundary lines of protected expression, but there must be reasonable grounds to justify the infringement.[221]

The Riotous Assembly Act provides for the criminalising of incitement to commit a serious offence. This offence is thus broader than section 16(2) of the Constitution which excludes certain expressions from the protection of the Constitution, for example, incitement of imminent violence. Incitement under the Riotous Assembly Act includes incitement of imminent violence and offences that do not contain the element of violence.

Political leaders are fond of using zealous political rhetoric when addressing followers. It is, therefore, necessary to carefully analyse these speeches to consider whether these statements constitute a serious offence, falls under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, or needs to be investigated by the South African Human Rights Commission.[222] Such utterances may fall in the framework of all of above.[223]

In South Africa, the government enacted supplementary legislation to support the objects of the Constitution. For example, the Gatherings Act already provides that no person may:

> …perform any act or utter any words which are calculated or likely to cause or encourage violence against any person or group.[224]

The Promotion of Equality and Prevention of Unfair Discrimination Act was enacted to provide for instances where certain methods of expression are not allowed. Section 10(1) of the Act, for example, prohibits hate speech:

> …no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

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220 *Economic Freedom Fighters* 2020 para [33].
221 *Economic Freedom Fighters* 2020 para [33].
222 The South African Human Rights Commission is a national human rights institution mandated by South Africa's Constitution s 184 to "protect, promote, and monitor human rights in the country, it is mandated to investigate, report, facilitate redress where applicable, carry out research, and educate on human rights".
223 *Khumalo* 289. See also Burchell 2019 *Acta Juridica* 212-214.
224 Gatherings Act s 8(6).

(a) be hurtful;
(b) be harmful or to incite harm;
(c) promote or propagate hatred.[225]

This section does not require any 'imminent violence', merely harm. Proceedings in terms of the Equality Act are not akin to criminal proceedings, and are among the court's powers – in such case, referral of the matter is made to the NPA for possible prosecution.[226] The Equality court must hold an enquiry to determine whether hate speech has taken place as alleged.[227] The South African Human Rights Commission may also investigate complaints with regard to a purported infringement of human rights.

Due to problems experienced with unlawful utterances in South Africa, especially over social media, the government tabled the Prevention and Combating of Hate Crimes and Hate Speech Bill 9 of 2018[228] in parliament. The Bill provides for the offences of hate crime[229] and hate speech,[230] and defines electronic communication.[231] The sentence applicable includes a fine and imprisonment not exceeding three years for first-time offenders, and a fine or imprisonment for a period not exceeding five years

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225 The Act also provides for "prevention and general prohibition of unfair discrimination, prohibition of unfair discrimination on ground of race, gender, disability, harassment, dissemination and publication of unfair discriminatory information".

226 Promotion of Equality and Prevention of Unfair Discrimination Act ss 10(2), 21(2)(n).

227 Promotion of Equality and Prevention of Unfair Discrimination Act s 21.

228 Explanatory summary of Bill published in *GG* 41543 of 29 March 2018.

229 Prevention and Combating of Hate Crimes and Hate Speech Bill s 3(1) "A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics: (a) age; (b) albinism; (c) birth; (d) colour; (e) culture; (f) disability; (g) ethnic or social origin; (h) gender or gender identity; (i) HIV status; (j) language; (k) nationality, migrant or refugee status; (l) occupation or trade; (m) political affiliation or conviction; (n) race; (o) religion; (p) sex, which includes intersex; or (q) sexual orientation … (3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her."

230 Prevention and Combating of Hate Crimes and Hate Speech Bill s 4(1)(a) "Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to – (i) be harmful or to incite harm; or (ii) promote or propagate hatred, based on one or more of the following grounds: (aa) age; (bb) albinism; (cc) birth; (dd) colour; (ee) culture; (ff) disability; (gg) ethnic or social origin; (hh) gender or gender identity; (ii) HIV status; (jj) language; (kk) nationality, migrant or refugee status; (ll) race; (mm) religion; (nn) sex, which includes intersex; or (oo) sexual orientation, is guilty of an offence of hate speech… (3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her."

231 Prevention and Combating of Hate Crimes and Hate Speech Bill s 4(1)(b).

for any subsequent offence.[232] It will be possible to institute prosecution for inciting hate crime and hate speech when the Act comes into operation. The offence of hate speech already provides for the incitement of harm. However, Burchell foresees that the meaning of hateful, harmful and hurtful speech will confuse the ordinary citizen.[233]

The government recently published the Cybercrimes Act 19 of 2020, however, the date of commencement is still awaited. Part II of the Act provides for malicious communications. Section 14 prohibits the disclosure[234] of a data message to a person or group of persons[235] with the intention to incite the causing of damage to property[236] or violence[237] against a person or group of persons by means of an electronic communications service. It is also an offence if a data message which threatens a person or a related person[238] with damage to property or violence is intentionally disclosed by means of an electronic communications service.[239] Imminent violence is not a requirement, it is also not necessary that the damage to property or bodily harm need to constitute a serious offence.

6.4.3 Section 17 of the Riotous Assemblies Act

Section 17 clarifies in which circumstances the common-law offence of incitement to public violence are committed:

> A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission

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232 Prevention and Combating of Hate Crimes and Hate Speech Bill s 6.

233 Burchell 2019 *Acta Juridica* 217-218.

234 'Disclose' in respect of a data message means to –
(a) send the data message to a person who is the intended recipient of the electronic communication or any other person;
(b) store the data message on an electronic communications network, where the data message can be viewed, copied or downloaded; or
(c) send or otherwise make available to a person, a link to the data message that has been stored on an electronic communication network, where the data message can be viewed, copied or downloaded." See s 13.

235 A 'group of persons' means "characteristics that identify an individual as a member of a group, which characteristics include without limitation, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth or nationality." See s 13.

236 'Damage to property' means "damage to any corporeal or incorporeal property". See s 13.

237 'Violence' means bodily harm. See s 13 and Chapter 3 footnote 89.

238 'Related person' means "any member of the family or household of a person or any other person in a close relationship with that person." See s 13.

239 Section 15.

> of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed.[240]

This section is not applicable to other offences, only to public violence. Section 17 does not constitute an offence on its own but qualifies the common-law offence of incitement. The common-law offence of incitement to public violence can be committed in both a private or public place, and can take place by way of conduct, speech or publication. The reasonable outcome of this conduct, speech or publication must be the commission of an act of public violence by a person who witnessed the conduct or was addressed to commit such act. As such, the consequences of the conduct, speech or publication must be that persons or members of the public present, or those hearing the speech or seeing the publication, would resolve to public violence.[241] In the *Economic Freedom Fighters*-case,[242] the court emphasised that:

> Even the common law criminalises incitement that could lead to the 'high risk of a *dangerous* situation developing'. Punishing that kind of incitement is meant to achieve 'the deterrence of future crime [and] restraint of the *dangerous* offender'. The risk must be fairly high and the situation sought to be created, *dangerous*. The offence thus exists to deter not just any offender, but a dangerous one, who poses a serious threat.[243]

Section 17 specifically establishes the crime of public violence while section 18(2)(b) of the Act provides for the crime of incitement to commit any serious common law or statutory offence. In practice, the state would be able to proceed under the common law or section 18(2)(b) of the Act. It must be considered that other offences, for example, trespassing on land as part of land invasion, nearly always includes elements of public violence.

6.4.4 Section 18(2)(b) of the Riotous Assemblies Act

Section 18(1) of the Riotous Assemblies Act criminalises the attempt to commit the statutory offences of conspiracy, and inducing another person to commit a statutory or common-law offence, as follows:

> Any person who –
> (a) conspires with any other person to aid or procure the commission of or to

240 Riotous Assembly Act s 17.
241 *R v Nlhovo* 1921 AD 485.
242 *Economic Freedom Fighters* 2020 25.
243 *Economic Freedom Fighters* 2020 para [48]; also see Burchell *Principles of criminal law* 528-529.

commit; or

(b) incites, instigates, commands, or procures any other person to commit, any serious offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

The abovementioned amended section is applicable for 24 months after the judgment date,[244] or until parliament is able to rectify the constitutional defect (the section previously was applicable to 'any offence').[245]

The object of section 18(2)(b) is to prohibit the influencing of any person to commit any serious offence under the South African law, including offences stemming from the right to gather. Section 18(2)(b) is an absolute necessity for crime prevention.[246] Any serious offence qualifies. Van der Merwe[247] argues that incitement to genocide may be prosecuted under the Riotous Assemblies Act read together with the Rome Statute of the International Criminal court,[248] for example, the *Khumalo*-case utterance which may possibly qualify as incitement to genocide:

> I want to cleanse this country of all white people. we must act as Hitler did to the Jews … Noo seriously though u oppressed us when u were a minority and then manje[249] u call us monkeys and we suppose to let it slide. white people in south Africa deserve to be hacked and killed like Jews. U have the same venom moss. look at Palestine. noo u must be bushed[250] alive and skinned and your off springs used as garden fertiliser.[251]

244 Judgment was given on 27 November 2020.

245 The Constitutional Court declared s 18(2)(b) of the Riotous Assemblies Act to be invalid to the extent that it criminalises the incitement of another to commit "any offence" and ordered that "any offence" must be replaced with the wording "any serious offence". See *Economic Freedom Fighters* 2020 para [78]; para 6.4.5 below.

246 *Economic Freedom Fighters* 2020 para [66].

247 Van der Merwe 2013 *PELJ* 330-370.

248 Van der Merwe 2013 *PELJ* 338, 352. South Africa acceded to the Genocide Convention in 1998. "The Rome Statute reflects the wording of the Genocide Convention with regards to the definition of direct and public incitement to commit genocide, article 25(3)(e) provides that in accordance with the Statute, a person shall be criminally responsible and liable for punishment for a crime … in respect of the crime of genocide, if ... directly and publicly incites others to commit genocide. Article 6 of the Statute defines genocide as follows: 'genocide' means 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

249 "Now" in isiZulu; see *Khumalo*-case para [1].

250 "Burned" see *Khumalo*-case para [1].

251 *Khumalo* para [1].

The Equality Court referred the matter to the DPP for possible prosecution, however, the offences under the Prevention and Combating of Hate Crimes and Hate Speech Bill,[252] when in operation, may be better suited to deal with these types of utterances.

The Constitutional Court in the case of *Economic Freedom Fighters*[253] found that incitement of non-serious offences do not cause as much public harm as incitement of serious offences.[254] The Court accentuated the fact that there will be practical challenges to decide what constitutes a serious offence since what is serious to some may not necessarily be serious to others.[255] There is, however, an element of fluidity in relation to which offences are to be understood as serious.[256] Murder, rape, armed robbery, fraud, human trafficking, and corruption are offences that fall within the meaning of serious offences. Many more crimes may fit the description, especially crimes that are evil by nature.[257]

The term 'serious' is an expression or a concept that courts are familiar with. Especially in the context of considering an appropriate sentence, courts refer to the seriousness of the offence concerned. Courts should find it relatively easy to deal with the question on a case-by-case basis, aided by existing jurisprudence.[258] Current legislation especially provides for useful guidelines, for example, Schedules 1, 2 (Parts II and III) and sections 5-8 of the Criminal Procedure Act 51 of 1977 list offences that can qualify as serious offences.[259] Although the Schedules to the Criminal Procedure Act include a number of statutory offences, they do not contain all statutory offences that could reasonably be said to constitute serious offences.[260] The inexperience of police officials, prosecutors and magistrates can have a bearing on the decision what constitutes a serious offence. However, the facts of each case must be the decisive factor.

In contrast, it is not required in the recently published Cybercrimes Act 19 of 2020 (of which commencement is still awaited) that incitement or the threat to commit an

252 See footnote 228 above.
253 *Economic Freedom Fighters* 2020 25.
254 *Economic Freedom Fighters* 2020 para [64].
255 *Economic Freedom Fighters* 2020 para [69].
256 *Economic Freedom Fighters* 2020 para [69].
257 *Economic Freedom Fighters* 2020 para [69].
258 *Economic Freedom Fighters* 2020 para [70].
259 *Economic Freedom Fighters* 2020 para [71].
260 *Economic Freedom Fighters* 2020 para [71].

offence must constitute a serious offence. It is also not a prerequisite that the incitement or threat must include serious damage to property or serious bodily harm.[261] However, a reasonable person in possession of the data message, with due regard to all the circumstances, must perceive the data message, either by itself or in conjunction with any other data message or information, as a threat of damage to property or violence to a person.[262] Any incitement or threat to damage to property or to do bodily harm to a person is thus sufficient. It seems, therefore, that incitement or a threat on social media to cause damage to property or bodily harm to a person does not exclude non-serious offences, or that the damage to property or violence to a person needs to be imminent, or to take place in a reasonable space of time.

Although the purpose of incitement is to influence a person to commit a serious offence, the focus is only on the inciter's conduct, and not on the other person's (incitee) susceptibility to be influenced.[263] The person may be manipulated by words (oral or written), movement or an act or acts. Other instances to commit the offence are by way of "requests, instructions, encouragements, imploration, to persuades, hires, put pressure on, bribes or to promise a gift".[264] In *R v Radu*,[265] the accused was charged on a count of incitement to commit public violence.[266] At a meeting of 50 people, he made a speech, and used words from which it might reasonably be expected that the natural and probable consequence of his words would, under the circumstances, cause public violence by members of the public or by persons to whom the speech was made to.[267] The court found that:

> …the criterion to be applied is not what the accused intended, but what a reasonable man, under the circumstances, should have expected to be the natural and probable consequences. It is an objective test that is to be used and when once the objective test is satisfied adversely to the accused, then his blameworthy conduct of mind, a *mens rea*, is established and he cannot rebut it by showing that his mind was devoid of any wrong intent since he is judged by the outward manifestations of his mind.[268]

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261 See footnotes 234-239 above detailing ss 14 and 15 of the Cybercrimes Act.
262 Section 15.
263 Snyman *Snyman's criminal law* 257.
264 Snyman *Snyman's criminal law* 258.
265 *R v Radu* 1953 (2) SA 245 (E) (hereinafter *Radu*).
266 See *R v Maxaulana* 1953 (2) SA 252 (E) 253 (hereinafter *Maxaulana*).
267 *Radu*-case 246.
268 *Radu* 246.

The Equality Court in the *Khumalo*-case observed that the term 'incite' in the context of section 16 of the Constitution, and section 10 of the Equality Act means to "spur on, rouse, to stir up, to urge, instigate and stimulate others to action".[269] It is important that the words or phrase must be read in the framework of the text. The court confirmed that this implies an objective test, and that "intention shall be deemed if a reasonable reader would so construe the words".[270] The circumstances in which words are used are therefore significant.[271] In *R v Maxaulana*,[272] the presiding officer considered the background or history of the matter, the speeches of others at the meeting, the conduct of the accused, and the conduct of the audience so as to assess whether incitement could be inferred.[273]

It is not required that the inciter knows the identity of the person or persons incited. The incited persons may be a crowd or unknown people.[274] The inciter further must have the intention to influence someone to commit an offence and believe that someone will act with the intention to commit the offence.[275] In *S v Nkosiyana and Another*,[276] the court remarked:

> …an inciter is seen as one who reaches and seeks to influence the mind of another to the commission of an offence. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of an offence. Where the intended influence does not reach the mind of the prospective incitee, the offence may be one of attempted incitement, e.g. where an inflammatory letter is sent but goes astray. It is the conduct and intention of the inciter which is vitally in issue… Hence, depending on the circumstances, there may be an incitement irrespective of the responsiveness, real or feigned, or the unresponsiveness, of the person sought to be so influenced.[277]

Snyman is of opinion that attempt to commit incitement and conspiracy to commit incitement is possible.[278] In practice, the courts need to apply the above-mentioned principles as established by the court in *Nkosiyana* to ascertain if the inciter sought to influence the mind of the incitee towards the commission of an offence. For example,

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269 *Khumalo* para [89].
270 *Khumalo* para [89].
271 *Radu* 250.
272 *Maxaulana* 254.
273 *Maxaulana* 254.
274 Snyman *Snyman's criminal law* 259.
275 Snyman *Snyman's criminal law* 260.
276 *S v Nkosiyana and Another* 1966 (4) SA 655 (A) (hereinafter *Nkosiyana*).
277 *Nkosiyana* 659.
278 Snyman *Snyman's criminal law* 262-263.

in *Economic Freedom Fighters,*[279] the charges read that the applicant "incited, instigated, commanded or procured his Economic Freedom Fighters followers and/or others to commit a crime, to wit; trespass in contravention of section 1(1) of the Trespass Act, by illegally occupying vacant land".[280] This criminal trial has been put on hold pending the outcome of the constitutional challenge.[281] Although the allegations in the *Economic Freedom Fighters* were not tested in court, and the circumstances in which the utterances were made are unknown, the applicant reportedly expressed the following statements:

> I can't occupy all the pieces of land in South Africa alone. I cannot be everywhere. I am not [the] Holy Spirit. So you must be part of the occupation of land everywhere else in South Africa.[282]
>
> If you see a piece of land, don't apologise, and you like it, go and occupy that land. That land belongs to us.[283]
>
> Occupy the land, because [the State has] failed to give you the land. If it means going to prison for telling you to take the land, so be it. I am not scared of prison because of the land question. We will take our land; it doesn't matter how. It's becoming unavoidable, it's becoming inevitable – the land will be taken by whatever means necessary.[284]

When considering the words spoken, it is clear that followers and/or the general public are addressed, although they may be unidentified. Known as well as unknown people are instructed to take land. It is not required that the crowd, the followers or persons who listen to the words or read the words over social media, must be known. The instruction is sufficiently specific – go to land and take it. The instruction does not differentiate between occupied and unoccupied land. Therefore, the words indicate that people must trespass on land that belongs to somebody else (whether state- or privately owned) and occupy it – whether the identity of the owners is known or unknown. The intention is to influence a person or persons to commit an offence while believing such person or persons will act with the intention to commit the offence.

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279 *Economic Freedom Fighters* 2019 297.

280 Ngcobo https://www.iol.co.za/news/malema-land-grab-case-postponed-to-thursday-10122281 (Date of use: 2 November 2020); Wicks https://www.timeslive.co.za/politics/2018-06-25-julius-malema-appears-in-court-on-land-invasion-charges/ (Date of use: 02 November 2020).

281 See footnote 200 above.

282 *Economic Freedom Fighters* 2020 para [7].

283 *Economic Freedom Fighters* 2020 para [8].

284 *Economic Freedom Fighters* 2020 para [9].

The question could be asked whether the offence of trespass in contravention of section 1(1) of the Trespass Act 6 of 1959 constitutes a serious offence, as required for a conviction of incitement. The nature, extent or effect of what people are being incited to do must be serious, and it must be in the interest of the public to do so.[285] The incited offence must threaten serious harm or danger either to individuals, society, public order, property or the economy.[286] Trespassing on land, as in the abovementioned circumstances, constitutes a daily growing problem of land invasion in South Africa, and constitutes a potential serious offence. It has severe political and economical consequences, goes hand in hand with violent conduct, and raises questions with regard to the dignity of destitute people. It is, therefore, suggested that incitement to trespass in these circumstances must be seen as a serious offence.

6.4.5 The constitutionality of section 18(2)(b) of the Act

In *Economic Freedom Fighters*, the applicants argued that section 18(2)(b) of the Riotous Assemblies Act is unconstitutional and invalid by reason of its over-breadth since the section criminalises the incitement of others to commit 'any offence', and therefore infringes the right to freedom of expression protected by section 16 of the Constitution.[287]

The Court was of the opinion that section 18(2)(b) of the Act which criminalises incitement to commit 'any offence' is a form of expression that is ordinarily protected by section 16(1) of the Constitution.[288] The Court, therefore, had to established if the limitation is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom. The Court pointed out that section 18(2)(b) of the Act is necessary for crime prevention,[289] and referred to the decision of the ECtHR in *Handyside v The United of Kingdom*[290] – where it was noted that the right to freedom of expression is –

> …applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ... Such are the demands of such pluralism, tolerance and

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285 *Economic Freedom Fighters* 2020 para [50].
286 *Economic Freedom Fighters* 2020 para [51].
287 *Economic Freedom Fighters* 2020 para [30].
288 *Economic Freedom Fighters* 2020 para [34].
289 *Economic Freedom Fighters* 2020 para Para [41].
290 *Handyside v The United of Kingdom* No 5493/72 ECtHR 1976.

broadmindedness without which there is no 'democratic society'.[291]

The Court found that the Constitution does not tolerate incitement or 'advocacy' to commit any offence as a limitation of the right to freedom of expression, therefore, it cannot be correct to criminalise the incitement of any offence that does not pose a danger or serious harm to anything or anybody.[292] When national interests, the democracy, the dignity or physical integrity of people or property could be imperilled, free speech may ordinarily be limited.[293] Legislation that seeks to limit free speech must be meant to curb incitement of offences that seriously threaten the public interest, national security, the dignity or physical integrity of individuals.[294]

When presented with opportunities to define the bounds of permissible legislative intrusion, courts must do so by promoting the spirit, purport and objects of the Bill of Human Rights.[295] The phrase 'any offence' is therefore overbroad and inhibits free expression.[296] To confine the prohibition of incitement to serious offences, free expression must be promoted and crime prevention enhanced.[297] Consequently, only the incitement of potentially serious offences is criminalised.[298]

All legal systems do have some piece of legislation providing for attempt, conspiracy and inducing/inciting another person to commit offences.[299] No legal system can function properly without such legislation.[300] Law and order would suffer if the police were not able to intervene when people are preparing to commit offences.[301] Especially when groups of people are incited to commit serious offences, it may have dire consequences for the democracy of a state. Courts will not easily interfere with acts criminalising conduct which is prohibited by the Constitution and international and regional instruments. Since the Riotous Assemblies Act causes disgruntlement due to being crafted by the apartheid's government, a possible solution may be to include

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291 *Economic Freedom Fighters* 2020 paras [45], [49].
292 *Economic Freedom Fighters* 2020 para [46].
293 *Economic Freedom Fighters* 2020 para [46].
294 *Economic Freedom Fighters* 2020 para [47].
295 *Economic Freedom Fighters* 2020 para [59].
296 *Economic Freedom Fighters* 2020 para [61].
297 *Economic Freedom Fighters* 2020 para [61]
298 *Economic Freedom Fighters* 2020 para [63].
299 See Glazebrook ***Blackstone's** statutes on Criminal law* 73-75; 359-364. As afore-mentioned in para 6.4, the goal of section 18(2)(b) of the Riotous Assemblies Act is crime prevention. See Riotous Assemblies Act s 41.
300 Snyman *Snyman's criminal law* 241 classifies these forms of conduct as inchoate offences.
301 Snyman *Snyman's criminal law* 241.

legislation providing for attempt, conspiracy and incitement in a Criminal Law Amendment Act.

6.5 Offences under the National Road Traffic Regulations

Offences under the National Road Traffic Regulations 2000[302] are important when protest action takes place on public roads. It is difficult to prove that persons act in concert or with a common purpose, especially during violent gatherings, therefore, it is easier to hold individuals or smaller groups accountable for certain conduct. Protest action on roads, shutting roads down, or causing damage to vehicles draws the attention of the general public by triggering inconvenience, losses, and damage.[303] It is also not always clear what the cause of the protest action is. The opportunity is usually exploited to loot cargo from trucks.[304]

This section focuses on the provisions in the National Road Traffic Act which can be applied by the police during protest action or gatherings on roads. Section 111 of the Road Traffic Act (Act 29 of 1989)[305] regulates racing and sport on public roads, but does not apply in respect of a gathering or demonstration held in accordance with the Gatherings Act.[306] Where there is conflict between the provisions of the Gatherings Act and the National Road Traffic Regulations, the provisions of the Gatherings Act will prevail.[307] The National Road Traffic Regulations Act controls the duties of pedestrians,[308] the hindering or obstructing of traffic on public roads,[309] vehicles left or abandoned on public roads,[310] and provisions relating to freeways.[311] In the following sub-paragraphs, these provisions will be considered.

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302 Published in *GG* 20963 dated 17 March 2000, *GN* R225.

303 See TimesLive https://www.timeslive.co.za/news/south-africa/2018-08-08-protest-action-shuts-roads-in-north-west-and-kwazulu-natal/ (Date of use: 1 December 2020).

304 Wicks https://www.timeslive.co.za/news/south-africa/2018-06-19-cars-stoned-trucks-looted-as-kwazulu-natal-gauteng-protests-shut-roads/ (Date of use: 1 December 2020).

305 The section of the Act was repealed and replaced by s 317 of the National Road Traffic Regulations 2000. It consists of the same wording, but provides that the MEC of the province gives consent. Section 317(5) provides that a traffic officer can immediately withdraw permission, if the event causes danger.

306 Gatherings Act s 13.

307 Gatherings Act s 14.

308 National Road Traffic Regulations s 316.

309 National Road Traffic Regulations s 319.

310 National Road Traffic Regulations s 320.

311 National Road Traffic Regulations s 323.

6.5.1 Section 316 – Duties of pedestrians

This section prescribes the manner in which pedestrians must behave on a public road. Participants of gatherings stay pedestrians for the purpose of the Act. Participants who are part of an unlawful gathering may be prosecuted if they do not adhere to the basic road safety rules. Section 316 particularises in what way a pedestrian must use, walk on, or cross a public road. When a sidewalk or footpath is available, a pedestrian may not walk on a roadway except to cross the road.[312] If no sidewalk or footpath is available, a pedestrian must walk as near as practicable to the edge of the roadway on his or her right-hand side so as to face oncoming traffic.[313] When crossing at a pedestrian crossing, a pedestrian may not linger.[314] Section 316(5) will be applicable if participants of a demonstration or gathering assemble on a public road, and conduct themselves in such a manner so as to constitute a source of danger to themselves or to other road users.[315]

6.5.2 Section 317 – Racing and sport on public roads

Section 317 provides for racing and sport on public roads. The phrase 'race or sport' comprises any type of race, such as a speed trial or a reliability trial, any form of hill-climbing competition, or sports gathering, or any other activity of any kind which may represent a source of danger to traffic, or which may impede, obstruct or interrupt the normal flow of traffic.[316]

A gathering can consequently be seen as an activity, however the provisions of this section does not apply in respect of a gathering or demonstration held in accordance

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312 National Road Traffic Regulations s 316(1): "Whenever a sidewalk or footpath abuts on the roadway of a public road, a pedestrian shall not walk on such roadway except for the purpose of crossing from one side of such roadway to the other or for some other sufficient reason". Section 316(6) specifies that: "A pedestrian may cross a public road only at a pedestrian crossing or an intersection or at a distance further than 50 metres from such pedestrian crossing or intersection".

313 National Road Traffic Regulations s 316(2): "A pedestrian on a public road which has no sidewalk or footpath abutting on the roadway, shall walk as near as is practicable to the edge of the roadway on his or her right-hand side so as to face oncoming traffic on such roadway, except where the presence of pedestrians on the roadway is prohibited by a prescribed road traffic sign".

314 National Road Traffic Regulations s 316(3): "A pedestrian, when crossing a public road by means of a pedestrian crossing or in any other manner, shall not linger on such road but shall proceed with due despatch".

315 National Road Traffic Regulations s 316(4): "No pedestrian on a public road shall conduct himself or herself in such a manner as to or as is likely to constitute a source of danger to himself or herself or to other traffic which is or may be on such road".

316 National Road Traffic Regulations s 1.

with the Gatherings Act.[317] A traffic officer or a police member responsible for the safety of the public in the area where an unlawful gathering is proceeding, may stop the event to safeguard the safety of road users, if the performing or continuance of the event, in the traffic officer's or police member's opinion, is causing or may cause any hazardous or unjustifiable impediments for other road users, or even any of the participants in the event.[318]

6.5.3 Section 319 – Hindering or obstructing traffic on public road

This section is applicable when communities close public roads by placing or burning objects on the roads.[319] The provision prohibits anyone from putting or discarding (or the causing thereof) any type of object on a public road that may imperil lives or cause injury to road traffic.[320] The normal flow of traffic is disrupted, and sometimes vehicles are set alight. The obstruction of roads can proceed for days before the police are able to calm the situation. It is difficult to prove which community members were involved, and who were responsible for certain conduct since the participants change from hour to hour. This offence assists the police to arrest the individual who can be identified, putting burning tires on a road, hindering other road users, or closing roads. Similar provisions are found in New Zealand legislation. Section 22[321] of the Summary Offences Act 113 of 1981 provides for the obstruction[322] of a public way:[323]

> (1) Every person is liable to a fine not exceeding $1,000 who, without reasonable excuse, obstructs any public way and, having been warned by a constable to desist, – (a) continues with that obstruction; or (b) does desist from that obstruction but subsequently obstructs that public way again, or some other public way in the same vicinity, in circumstances in which it is reasonable to deem the warning to have applied to the new obstruction as well as the original one.

317 Gatherings Act s 1.
318 See the National Road Traffic Regulations s 317(5).
319 The National Road Traffic Regulations s 319(1) states: "No person shall wilfully or unnecessarily prevent, hinder or interrupt the free and proper passage of traffic on a public road". Section 320 provides that "if any vehicle was left on a public road in circumstances which in the opinion of a traffic officer, is likely to cause danger or obstruction to other traffic, it may be removed to a government facility and the owner shall be liable for expenses incurred".
320 See the National Road Traffic Regulations s 319(2): "Subject to the provisions of the Act or any other law, no person shall place or abandon or cause to be placed or abandoned on a public road any object that may endanger or cause injury to traffic on such road".
321 Summary Offences Act 113 of 1981 as amended.
322 Summary Offences Act s 22(2) – 'Obstructs' in relation to a public way, means "unreasonably impedes normal passage along that way".
323 Summary Offences Act s 22(2) – 'Public way' means "every road, street, path, mall, arcade, or other way over which the public has the right to pass and repass".

This section necessitates that criminal steps be implemented after being warned by a constable to stop obstructing a public way, therefore not adhering to an instruction. The offender has the opportunity to move away and escape prosecution. Section 137 criminalises wilful obstruction,[324] if a person without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway, he is guilty of an offence, and liable to a fine not exceeding level 3 (£1,000) on the standard scale. Section 161 again regulates the causing of danger or annoyance to public road users.[325] A person who deposits anything on a highway, in consequence of which a user of the highway is injured or endangered, is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale. The same applies to a person who lights any fire on or over a highway which consists of or comprises a carriageway. Governments cannot function without legislation providing for the orderly use of public roads.

6.5.4 Section 323 – Special provisions relating to freeways

The section is applicable when participants gather on freeways or use vehicles or animals to block roads. The section prohibits the operating of any animal-drawn vehicle, or a tractor or tractor hauling a trailer on a freeway.[326] No person may be on foot on a freeway, except if this situation is due to circumstances beyond their control, and they remain within an area where a valid road traffic sign indicates that vehicles may stop or park.[327] A person may not stop his or her vehicle or another vehicle on the freeway unless in this designated area, and he or she is in an emergency situation, or when a traffic sign or traffic officer directs him or her to do so.[328] No one may leave an animal on the freeway, or let an animal onto the freeway.[329] This particular section prevents participants of a gathering to chase cattle or sheep on highways, or to close roads with busses, tractors or taxis. These charges can be brought against one individual or all the participants of a gathering, if they acted with common purpose.

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324 See Glazebrook ***Blackstone's statutes** on Criminal law* 87; the Highways Act 1980.
325 Section 161 of the Highway Act 1980.
326 The National Road Traffic Regulations s 323(1)*(a)*, *(f).*
327 The National Road Traffic Regulations s 323(2)*(a).*
328 The National Road Traffic Regulations s 323(2)*(c).*
329 The National Road Traffic Regulations s 323(2)*(b)* – "except in or on a motor vehicle or within an area reserved for the stopping or parking of vehicles by an appropriate road traffic sign, or leave an animal in a place from where it may stray onto a freeway". There is, according to s 323(3), a presumption that an animal was left or allowed on the freeway by the owner of such animal, unless there is evidence to the contrary.

Any person who contravenes or fails to comply with any of the above-mentioned provisions of the National Road Traffic Regulations is guilty of an offence and liable to a fine or to imprisonment for a period not exceeding one year.[330] The *Guidelines on freedom of peaceful assembly* advices that unnecessary or disproportionately harsh penalties for behaviour during gatherings can inhibit the holding of the events, furthermore, it has a unnerving effect that can prevent participants from attending. Penalties prescribed for minor offences must be low.[331] Participants in peaceful gatherings must also not be subjected to criminal intervention.[332] Therefore, police members must be well trained and informed when they consider arresting participants of peaceful gatherings for committing minor offences, which include traffic offences.

The offences under the National Road Traffic Regulations Act will usually not be applicable when gatherings proceed in accordance with the Gatherings Act. The police will close parts of roads to assist the gatherings to proceed peacefully. When gatherings are unlawful, the Act supports the police to remove persons who do not adhere to road rules, and cause a danger to other road users. The Act assists the state to prosecute an individual who is seen to commit an offence during protest action or public violence. These offences are necessary to guarantee safety for all road users.

6.6. Intimidation

In South Africa, intimidation frequently forms part of the conduct at a gathering. Intimidating conduct is utilised by groups or individuals to convey the gravity of their plight. Pressure is placed on an individual, the government, groups or the public, to omit or to do something.

To differentiate between threats, intimidation and political hyperbole may create a problem, as seen in the approach of the court in *Moyo and Another v Minister of Justice*

330 Section 89 of the Highway Act 1980.
331 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [222].
332 European Commission for Democracy through Law *Guidelines on freedom of peaceful assembly* 2010 para [226].

and Constitutional Development and Others.[333] From the minority[334] and majority[335] decisions, it is clear that the wording of the Intimidation Act 72 of 1982 can be difficult to apply and understand. However, the Constitutional Court[336] declared section 1(1)(b) and 1(2) of the Intimidation Act unconstitutional and invalid.[337] It is projected that the remaining offences in the Act will follow suit.

Intimidation in South Africa falls under the heading of 'crimes against bodily integrity'.[338] Intimidation usually intersects with the offence of public violence. The offence also shows commonalities with other offences such as assault, extortion, *crimen iniuria*, and incitement to commit an offence. The purpose of the intimidation offence is to punish people who intimidate others to conduct themselves in a certain manner; such as not to give evidence in court, not to support a certain political organisation, not to pay municipal accounts, or to support strike action.[339] The Act does not require that a group of persons are needed to commit intimidation. One person can intimidate a whole community. On the other hand, a community can likewise intimidate one person. The current offences under the Intimidation Act have a general, broader scope which is difficult to read and confusing to ordinary members of the public, therefore, the question is considered whether offences with regard to intimidatory conduct must not provide for specific problems experienced in South Africa.

6.6.1 Definition

The Intimidation Act 72 of 1982 prohibits certain forms of intimidatory behaviour. It provides for section 1(1)(a)[340] – intimidation by violence or threat of violence; section

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333 *Moyo and Another v Minister of Justice and Constitutional Development and Others* 2018 (2) SACR 313 (SCA) (hereinafter *Moyo* 2018).

334 Mbha and Van der Merwe JA.

335 Wallis, Maya and Makgoka JA.

336 *Moyo and Another v Minister of Police and Others* [2019] ZACC 40 (hereinafter *Moyo* 2019).

337 See discussion in para 6.6.3 below.

338 Snyman *Snyman's criminal law* Chapter XV.

339 Snyman *Snyman's criminal law* 401.

340 Intimidation Act s 1(1)(a) states: "Any person who without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint – (i) assaults, injures or causes damage to any person; or (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment".

1(1)(b)[341] – intimidation by conduct inducing fear of harm (which was declared unconstitutional); and section 1A(1) – intimidation of the general public, a particular section of the population, or inhabitants of a particular area.[342]

In the *Moyo*-case, the court stated that the offence of intimidation is directed at behaviour constituting intimidation, thus, the conduct must be intimidatory in character.[343] The minority in the *Moyo*-case noted that there is no need for the offence of intimidation since intimidation is encompassed by the offences of *crimen iniuria*, assault, and public violence. The majority decision pronounced the opposite in that the offence of intimidation is required to protect the people of South Africa against intimidatory conduct.[344] The court found that it was incorrect to suggest that intimidation is incorporated by the offences of *crimen iniuria*, assault, and public violence, although these offences may overlap.[345]

The Intimidation Act does not define what intimidation entails – intimidatory conduct must be inferred from the provisions providing for the offence itself. However, the wording of the Intimidation Act is so broad that it makes reading and understanding difficult, especially to members of the general public. The fact that intimidatory conduct

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341 According to Intimidation Act s 1(1)(b) – "Any person who acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication – (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person".

342 Intimidation Act s 1A(a) declares: "Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere – (a) commits an act of violence or threatens or attempts to do so; (b) performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act; (c) conspires with any other person to commit, bring about or perform any act or threat referred to in paragraph (a) or act referred to in paragraph (b), or to aid in the commission, bringing about or performance thereof; or (d) incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat, Such a person is guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment". See also Hoctor (ed) *South African Criminal law and procedure* HA1 1.

343 *Moyo* 2018 para [94].

344 *Moyo* 2018 para [85].

345 *Moyo* 2018 para [103]. See para [85] – "If the section is struck down it will leave the police without any means to protect the people of the country. It will also rob them of a weapon to be used against anyone making threats having a broader impact, such as a threat to release a poisonous substance into a city's water supply, or a hoax warning that an explosive device has been placed in a football stadium or shopping centre".

can manifest itself in many ways aids to the confusion.[346]

6.6.2 Intimidatory behaviour

As the world evolves, new forms of intimidatory behaviour appear daily. It is important that police are alert and properly trained to identify and prevent intimidation. The police frequently do not realise that participants of gatherings are exploiting the right guaranteed in section 17 of the Constitution[347] to commit organised crime or intimidation.[348] The intimidation may be directed towards an individual or aimed generally at the population, or specific sections thereof. In practice, it is usually rival groups or different alliances in political parties who mobilise different sections of the community to intimidate others.

There are many examples of intimidatory behaviour. The proper interpretation of section 1(1) of the Intimidation Act requires that the offence retain the same character in each of its manifestations – the nature of all cases must be intimidatory.[349] Intimidatory acts may manifest themselves in various ways:

> Seeking to persuade a person to vote for a particular political party, or in favour of strike action, by standing at the entrance to the polling station, catching their eye and drawing one's hand across one's throat, simulating a knife cutting their throat, is an example of intimidation by act or conduct. A bank manager who threatened to withdraw a customer's overdraft if they did not vote for a particular political party, or against a strike at the bank, is an example of intimidation by utterance or … sitting outside the neighbour's house night after night, ostentatiously loading and unloading a firearm. The writing of anonymous threatening letters… "If you don't co-operate, I know where you live and where your children go to school".[350]

Other examples, amongst others, include smearing pig's blood on the entrance to a mosque accompanied by anti-Islamic slogans, or sending a threat to the media that unless a prisoner is freed, the water supply of a city will be poisoned, an explosive

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346 The court in *S v Motshari* 2001 (1) SACR 550 (NC) (hereinafter *Motshari*) 554 however determined that the provisions of the Intimidation Act are not applicable to quarrels between live-in lovers within the confines of their dwellings, since the sentence options are seen as too substantial.

347 See Chapter 3 above.

348 See Du Plessis https://www.pressreader.com/south-africa/volksblad/20181203/281844349703013 (Date of use: 10 October 2020); Du Plessis https://www.pressreader.com/south-africa/beeld/20181206/ 281775630233625 (Date of use: 10 October 2020); *South African Human Rights Commission v Masuku and Another* 2018 (3) SA 291 (GJ) (hereinafter *Masuku*).

349 *Moyo* 2018 para [95].

350 *Moyo* 2018 para [96].

triggered, or medicine or baby food contaminated.[351]

Intimidatory conduct is regularly part of the behaviour of striking employees. As such, a common side-effect of strike action by trade unions and employees are unlawful behaviour, violence and intimidation.[352] Picketing rules established for strikes are not adhered to and strikes are marked with acts of violence and intimidation.[353] This conduct necessitates that employers obtain court interdicts compelling striking workers to adhere to picketing rules, and to refrain from acts of violence and intimidation, the wielding of weapons, blockading premises or interfering with operations. For example, in *DisChem Pharmacies Ltd v Malema & Others*,[354] picketing rules were issued by the CCMA, and enforced by the court; still, striking employees disregarded these measures. Stones were thrown at non-striking employees, passers-by and delivery vehicles.[355] The court was of opinion that being violent or committing acts of intimidation lead to the forfeiture of the right to conduct a picket or protest as part of strike action.[356] In these circumstances, the behaviour of strikers are seen as intimidatory and, therefore, prohibited.

Problems are currently experienced in South Africa with groups of people calling themselves business forums or seemingly belonging to a political party, specialising in intimidating building contractors or businesses. The instigators hire people, sometimes paying them with a meal to participate. The unlawful gatherings block the entrances to building sites or businesses, demanding money, jobs or shares in return for guaranteeing the safety of workers on the sites. The leaders of these groups may have interests in rival businesses or political parties.[357] Their conduct is violent and intimidating until their demands are met.[358] For example, in the matter of *Impangele*

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351 *Moyo* 2018 para [102].

352 *DisChem Pharmacies Ltd v Malema & Others* (2019) 40 ILJ 855 (LC) (hereinafter *DisChem Pharmacies*); *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others* (2018) 39 *ILJ* 609 (LC). See also Tenza 2018 *Stellenbosch LR* 471.

353 *Arnolds and Coca Cola (Lakeside)* (2019) 40 ILJ 1353 (CCMA).

354 *Arnolds and Coca Cola (Lakeside)* (2019) 40 ILJ 855 (LC).

355 *DisChem Pharmacies* 857.

356 *DisChem Pharmacies* 860. See also *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & Others* (2012) 33 *ILJ* 998 (LC) para [13].

357 See Selebano https://www.netwerk24.com/Nuus/Politiek/gwede-toe-rafel-dinge-uit-20181127 (Date of use: 2 November 2020) – Minister Gwede Mantasha testified before the Zondo-Commission that Gupta-companies recruited organisations to put pressure on financial institutions to reopen Gupta bank accounts.

358 Otto https://www.pressreader.com/south-africa/beeld/20181107/282192241999444 (Date of use: 2 November 2020).

Logistics,[359] the respondents were restrained by a court order from intimidating, assaulting, harassing, or threatening the workers of mining houses. The respondents were obstructing normal business activities, raising havoc, and blocking gates, impounding and hi-jacking mine vehicles.

From the above case, it is evident that intimidatory behaviour is not only committed by utterances, but also by acts or conduct. Intimidatory words may furthermore be published or spoken on social media. In *South African Human Rights Commission v Masuku and Another*, offensive statements targeting the Jewish community were made by Masuku on a website post.[360] The Equality Court found that Masuku's statements fall within the purview of section 10(1) of the Equality Act. Furthermore, the court held that it was reasonably conceivable that, in the context of the matter, a reasonable person in the Jewish community, in particular a Jewish person associated with Wits University, would probably be driven away through intimidation and fear for their security. It was irrelevant whether any actual attack became likely or followed,[361] or what the intention of Masuku was when he made the statements. The court referred to the fact that criminal law prohibits any person from intending "to put in fear or demoralise"[362] the general public or a particular section of the population or the inhabitants of a particular area by threatening acts of violence against them, or inciting and encouraging others to commit criminal acts against them.

6.6.3 The elements of fear and violence in intimidatory behaviour

The possible interpretations of the element of fear and whether imminent violence is required were some of the reasons why section 1(1)(b) of the Intimidation Act was declared unconstitutional. The reasoning of the Constitutional Court is, therefore,

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359 *Impangele Logistics* paras [7]-[15].

360 In his post he stated, *inter alia*, that "'Zionists ... belong to the era of their friend Hitler'; that 'every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine'; that 'we must target them ... and do all that is needed to subject them to perpetual suffering'. At the rally he said, inter alia, that 'Cosatu ... can make sure that for that side it will be hell'; that 'any South African family who sends its son or daughter to be part of the Israel Defence Force must not blame us when something happens to them with immediate effect'; and that 'whether it's at Wits, whether it's at Orange Grove, anyone who does not support equality and dignity, who does not support rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm'." See *Masuku* paras [5]-[6].

361 *Masuku* para [54].

362 *Masuku* para [54]. See para 6.4 above; Bilchitz 2019 *TSAR* 373.

important to establish the constitutionality of the rest of the provisions of the Act.[363]

Section 1(1)(a) of the Intimidation Act prohibits conduct intended to compel someone or persons to do or not to do something,[364] yet the provision does not require that fear must be created when intimidation takes place although fear usually plays a part in the commission of the offence. Usually, victims will feel intimidated because of the fear created to do what they are ordered to do. Section 1(1)(a) of the Act prohibits conduct intended to compel someone or persons to do or not to do something. The conduct includes assault of or damage to any person, as well as threatening to assault, kill a person or damage to any person. The method does not matter. Damage to any person includes damage to property. The conduct needs not to be violent since it is possible to damage property without committing a violent act, for example hacking a business's financial information. The offence is extensive not only covering bodily integrity but also damage to property or a threat to damage property. The offence does not require that the threat to cause damage must inspires a belief in another that the conduct is immediately going to take place.[365] Therefore, a mere threat to inflict damage in the future can be sufficient.

On the other hand, the element of fear is required by section 1A(1) of the Act providing for the intimidation of a group of persons or the general public.[366] Section 1A(1)(a) prohibits conduct intended to instil fear or to undermine or to induce the general public, or a part of the community, by committing an act of violence or threatening or attempting to do so. The method does not matter as long as the act is violent. Violence includes the "inflicting of bodily harm upon or killing of, or the endangering of the safety of, any person, or the damaging, destruction or endangering of property".[367] Anyone who performs any conduct which is aimed at causing or contributing towards such act or threat of violence, or attempts or takes any steps to perform such act,[368] or conspires with any other to commit such an act,[369] or instigates, commands or encourages another to commit or perform such act or threat,[370] is also guilty of the

363 *Moyo* 2019 40.
364 See footnote 341 above.
365 See Snyman *Criminal law* 447-450, the elements of the offence of assault requires that it must be a threat of immediate violence.
366 See footnote 343 above.
367 Intimidation Act s 1A(4).
368 Intimidation Act s 1A(1)(b).
369 Intimidation Act s 1A(1)(c).
370 Intimidation Act s 1A(1)(d).

offence. The offence is extensive, not only requiring the instilling of fear ('put in fear'), but also providing that the general public of part thereof be demoralised or induced to perform or to abstain from doing any act. The above raises the question as to how a court will measure the degree of fear or demoralisation or inducement of the public. Subjective fear or demoralisation might be induced because some people are of a nervous disposition. The offence does not require that the threat to commit an act of violence must inspire a belief that it is immediately going to take place, or possibly to take place in the near future, or at all. Therefore, a mere threat to inflict harm in the future can be sufficient. Political hyperbole may also inspire fear or demoralise or induce the public, or part thereof.

The difficulty in understanding and applying the concept of fear is seen in the minority and majority decisions of the *Moyo*-case[371] in the Supreme Court of Appeal. In this case, the constitutionality of section 1(1)(b)[372] was interrogated, on the grounds that the section violates the right to freedom of expression as guaranteed in section 16(1)[373] of the Constitution, and further criminalises any speech or conduct which created a subjective state of fear in any person, regardless of the intention to create fear.[374] According to the minority decision in the *Moyo*-case, the text of section 1(1)(b) does not require that fear be caused intentionally or negligently. The minority found that the use of the word 'or' distinguishes between two situations: one in which fear is created, whether reasonably or not, and another in which reasonable fear might be created, regardless of whether it was in fact created.[375] On the plain meaning of section 1(1)(b), it was assumed to include acts or conduct not relating to violence.[376] The fundamental problem with this section was that it obliterates the distinction between "true threats" and "political hyperbole."[377] The minority was of opinion that the

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371 *Moyo* 2018 313. In the Supreme Court of Appeal, the cases of Moyo and Sonti were consolidated. In *Moyo* para [8], after Moyo's request for a proposed march was denied; "he threatened to make sure that the complainants were removed, he threatened a repeat of Marikana, he stated that there will be bloodshed, he pointed fingers at the complainants, he charged towards the complainants, and he said that the complainants will not last at Primrose Police Station". In the *Sonti*-matter, Sonti was prosecuted under ss 1(1)(a)(ii) and 1(1)(b)(i) of the Act. The charge originated from telephone calls and text messages threatening to kill and burn down a house, forwarded in an attempt to compel the complainant to withdraw a criminal complaint. See para [10].

372 See footnote 342 above.

373 See para 6.4.2 above.

374 *Moyo* 2018 para [25].

375 *Moyo* 2018 para [27].

376 *Moyo* 2018 para [28].

377 *Moyo* 2018 para [30].

section creates over-breadth which could not be cured by an attempt to read it down, thus, it limits the right to freedom of expression as guaranteed in section 16 of the Constitution,[378] and is unconstitutional.[379]

The majority, on the other hand, found that an intimidatory act is criminal if it induces fear or the natural and probable consequence would be that it induces fear in a person observing the behaviour. A person who makes the threat can be prosecuted without it being necessary for anyone among the public to testify that they experienced fear as a result of the threat. The prosecution must establish that fear would reasonably have been expected as the natural and probable consequence of the threat. Fear only qualifies if it would reasonably be expected to arise; therefore, subjective fear that might be induced because some people are of a timid nature would not qualify.[380] The court found that political hyperbole requires *mens rea*, and that the fear must be both genuine and reasonable, and based on imminent harm, not a general state of nervousness, concern or apprehension. When conduct is lawful in the sense of enjoying either constitutional or statutory protection, then it is not intimidatory.[381] The context of the threat of violence is accordingly important.[382]

In the appeal to the Constitutional Court,[383] the defence argued that the way the majority interpreted the provision amounts to an impermissible reading-in, and that the section was 'read-down' in a manner that did not accord with the text.[384] Furthermore, that when reading-in is permissible, the interpretation accepted by the majority would

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378 *Moyo* 2018 para [35].

379 *Moyo* 2018 para [50]. The minority decision was also based on the legislative history of s 1(1)*(b)* of the Act. See para [43] where it is stated that "the offence of intimidation is a product of apartheid era legislation that was designed to control dissent against an unjust system. It is clear that its purpose has been rendered constitutionally offensive in modern day South Africa". The judge found at para [45] that "section 1(1)*(b)* of the Act constitutes one of the last and most insidious of the apartheid regime's efforts to curtail freedom of expression and political action that were aimed at bringing that abominable regime to an end. It has no place in a free, open and democratic South Africa which respects, protects, promotes and fulfils the right to freedom of expression, and falls to be struck from our statute books". The same argument was made in *Economic Freedom Fighters* 2019 para [6.4]. In this case, the court held at para [2] that laws enacted before the hard-fought democracy was won, are not automatically unconstitutional. Instead, all laws, whether enacted prior to 1994 or in the successive democratic years, must yield to the norms, values and letter of the Constitution.

380 *Moyo* 2018 para [107].

381 *Moyo* 2018 para [138].

382 *Moyo* 2018 paras [139], [147]. It is a defence to a charge of s 1(1)(b) that the accused was exercising the right to freedom of expression conferred by s 16(1) of the Constitution.

383 *Moyo* 2019 para [40].

384 *Moyo* 2019 paras [41], [46].

be overly broad due to vagueness.[385] The majority accepted that "intimidation means some kind of incitement to imminent harm or an inculcation of a reasonable fear for imminent harm."[386] Therefore, inserting 'intimidation' under section 1(1)(b) within the ambit of section 16(2) of the Constitution will not infringe on the constitutional guarantees of freedom of expression or peaceful protest.[387] However, the Constitutional Court was of the opinion that the offence does not carry this wide meaning, and held that:

> ...any intentional conduct that creates objectively reasonable fear of harm to person, property or security of livelihood is covered, then it is overbroad because it would criminalise protected free speech that does not incite imminent violence and probably also peaceful forms of protest.[388]

This understanding does not resemble section 16(2)(b) of the Constitution,[389] or appears in the text or in the context of the Intimidation Act.[390] Intimidatory conduct provided for in section 1(1)(b) addresses 'fear for one's safety', or the 'fear for the safety of one's property or security of one's livelihood', and does not support that the fear is related to actual harm or that the threat of such harm should be imminent.[391] In the Constitutional Court's view:

> …the majority's interpretation of intimidation amounts to an unjustified 'reading-in' that unduly strains the text, since the section itself contains no mention of imminent violence. The proper reading of the section does not include incitement of imminent violence, but only covers intentional conduct that creates an objectively reasonable fear of harm to person, property or security of livelihood, therefore it can criminalise protected free speech and probably also peaceful forms of protest.[392]

Since a literal reading of section 1(1)(b) appears to "criminalise any expressive act which induces any fear, of any kind, for one's own safety, or the safety of one's property, the security of one's livelihood, or the safety of another,"[393] the Constitutional Court found that the offence casts the net of liability too wide as it depends simply on the experience of fear by another.

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385 *Moyo* 2019 para [47].
386 *Moyo* 2019 para [64].
387 *Moyo* 2019 para [65].
388 *Moyo* 2019 para [65].
389 *Moyo* 2019 para [66].
390 *Moyo* 2019 para [67].
391 *Moyo* 2019 para [44].
392 *Moyo* 2019 para [69].
393 *Moyo* 2019 para [44].

The above arguments find application in the provisions of the remaining sections of the Intimidation Act. The wording 'to put in fear or to demoralise or to induce' and to 'performs any act which is aimed to cause, bring about, promote or contribute toward such act' are unclear, vague and difficult to understand for unrepresented or represented accused. Section 1A(1)(a) of the Act can also criminalise political hyperbole and emotionally charged rhetoric in the context of political and industrial action. By not defining the meaning of fear, to demoralise or to induce, implies that any speech or conduct which created a subjective state of fear in any person, regardless of the intention to create fear, to demoralise or to induce, is criminalised. The Act attempts to qualify the conduct by referring to acts of violence which mostly can be deemed as serious. However, the Act does not require imminent violence or that the act of violence must be able to take place in the near future. Consequently, it will be difficult to identify the unlawful conduct that the provisions seek to address. When provisions are open to different interpretations, it does not conform to the requirements of the Constitution, or regional and international instruments. When a provision needs reading-in in order to bring it into conformity with the Constitution, care should be taken that the text is not rewritten in order to achieve clarity. Furthermore, a statutory offence must be clear so that an unrepresented accused understands the details of the charge, and is informed in sufficient detail. Therefore, it is foreseen that the remaining sections of the Intimidation Act will properly also fail the constitutional test.

6.6.4 Presumptions in the Act

Section 1A(2) and (3) of the Intimidation Act create presumptions. Section 1A(2) declares that:

> …if it is proven by the prosecution that the accused committed an act of violence or threatens or attempts or performs any act which is aimed at causing, bringing about, promoting or contributing towards such act or threat of violence, or attempts, consents or takes any steps to perform such act or conspires with any other person to commit, bring about or perform any act or threat or to aid in the commission, bringing about or performance thereof or incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat; and it resulted or was likely to have resulted in putting fear, demoralise or induce the general public or a section thereof to do or to abstain from doing something, it is presumed, unless the contrary is proved, that the accused has committed that act with intent to achieve just such object.

This presumption raises more problems than give answers since the prosecution does not need to prove that the act of violence[394] or threat of violence is imminent, or will take place in the near future, or will take place at all. Any threatening utterance of harm will be sufficient to commit the offence. The act or threat must only likely result in putting fear in or demoralising or inducing the general public. Actual fear, demoralisation, or inducement is not a requirement. The presumption is too broad and vague to withstand constitutional muster.

Section 1A(3) of the Intimidation Act determines that when it is proven that the accused had unlawfully in his or her possession any automatic or semi-automatic rifle, machine gun, sub-machine gun, machine pistol, rocket launcher, recoilless gun or mortar, or any ammunition for or component part of such weaponry, or any grenade, mine, bomb or explosive, it is presumed, unless the contrary is proved, that the accused had it in his or her possession to achieve the object of putting fear, demoralise or induce the general public or a section thereof to do or to abstain from doing something.[395] The possession of any of the above-named items generally will put fear into members of the public when threatened with acts of violence.

6.6.5 Offences of unacceptable conduct relating to witnesses

Very few people in South Africa seem to be prosecuted for the offences created in the Intimidation Act.[396] One reason for this supposition is that many people who have been subjected to intimidation are, precisely because of the intimidation, afraid of laying criminal charges, or to testifying about the commission of the offence in a court.[397] Particularly when intimidatory behaviour has the support of the community, huge numbers from the community attend court cases,[398] which can be seen as passive intimidation. The community members are in front of the court building, in the passages, and in the court rooms. Their sheer numbers create fear and discourage witnesses to testify. In most instances, complainants are scared and of opinion that the courts cannot guarantee their safety, and as such choose not to testify in court.

394 See footnote 367 for the definition of violence as in Intimidation Act s 1A(4).
395 Intimidation Act s 1A(3).
396 Snyman *Criminal law* 455.
397 Snyman *Criminal law* 455.
398 Snyman *Criminal law* 455.

In this regard, section 18 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 was enacted to provide for offences with regard to unacceptable conduct concerning witnesses. These offences have a narrower field of focus than the Intimidation Act. When a person directly or indirectly intimidates or uses physical force, or improperly persuades or coerces another person, with the intent to –

(a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or

(b) cause or induce[399] any person to-

(i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;

(ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;

(iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;

(iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;

(v) give or withhold information relating to or contained in a police docket;

(vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or

(vii) be absent from such trial, hearing or other proceedings,

he or she is guilty of such an offence.[400]

Although the Act does not define the verb 'intimidates', it alludes to the use of physical force, improper persuasion, or coercing someone to do something. As such, the section is informative towards what conduct is deemed unlawful and unacceptable. Although the offence falls under the Prevention and Combating of Corrupt Activities Act, there is no reason why it could not be applicable when witnesses in other kinds of cases, for example, rape or public violence, are intimidated.

399 Prevention and Combating of Corrupt Activities Act s 1 – 'Induce' includes "to persuade, encourage, coerce, intimidate or threaten or cause a person and inducement has a corresponding meaning".

400 Prevention and Combating of Corrupt Activities Act s 18.

The Act provides that any person who attempts, conspires with any other person, or aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act, is guilty of an offence.[401] The offences also regulates on extraterritorial jurisdiction.[402] In certain circumstances, even though the offence was committed outside the Republic, a court in the Republic have jurisdiction in respect of the offence, or the offence is being deemed to be committed in the Republic. Section 1A(1) of the Intimidation Act further reiterates that the conduct of the person who intends to put fear or induce the general public or part thereof, can take place in the Republic, or elsewhere. The word 'elsewhere' indicates that the person does not need to be in South Africa.

Any person who is convicted of these offences under the Prevention and Combating of Corrupt Activities Act is liable; in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life; in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding eighteen years; or in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a period not exceeding five years.[403] The court may impose a fine equal to five times the value of the gratification involved.[404]

These offences are more clearly drafted and understandable to the general public than the broad offence of intimidation under the Intimidation Act. It will, however, depend on the discretion of the prosecutor under which Act prosecution is instituted. It is suggested that the government revisit the Intimidation Act, and consider enacting offences to prohibit specific conduct. It will create the opportunity to enact legislation with regard to intimidation that is more user-friendly and informative.

6.6.6 Intimidation laws in England and India

The current offences under the Intimidation Act have a general, broader scope which can be seen as difficult to read and understand by the general public. In England and India, the governments enacted legislation to provide for specific problems

401 Prevention and Combating of Corrupt Activities Act s 21.
402 Prevention and Combating of Corrupt Activities Act s 35.
403 Prevention and Combating of Corrupt Activities Act s 26.
404 Prevention and Combating of Corrupt Activities Act s 26(1)*(a)*(iii).

experienced in their countries. The wording is more specific, therefore, more informative with regard to what conduct is considered unacceptable.

6.6.7.1 England

Section 51 of the Criminal Justice and Public Order Act 1994[405] provides for intimidation, and specifically comments on witnesses, jurors and others. Subsection (1) focuses on police investigation and court proceedings, while subsection (2) highlights harm[406] done to any person:

> (1) A person commits an offence if –
> (a) he does an act which intimidates, and is intended to intimidate, another person ("the victim"),
> (b) he does the act knowing or believing that the victim is assisting in the investigation of an offence[407] or is a witness or potential witness or a juror or potential juror in an offence, and
> (c) he does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with.
> (2) A person commits an offence if –
> (a) he does an act which harms, and is intended to harm, another person or, intending to cause another person to fear harm, he threatens to do an act which would harm that other person,
> (b) he does or threatens to do the act knowing or believing that the person harmed or threatened to be harmed ("the victim"), or some other person, has assisted in an investigation into an offence or has given evidence or particular evidence in proceedings for an offence, or has acted as a juror or concurred in a particular verdict in proceedings for an offence, and
> (c) he does or threatens to do it because of that knowledge or belief.

It is immaterial whether the act or threat is made in the presence of the victim, or to a person other than the victim.[408] A person guilty of an offence under this section is liable on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both, on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.[409]

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405 Criminal Justice and Public Order Act 1994 C 33 part 111.

406 According to s 51(4) of the Criminal Justice and Public Order Act, the harm may be financial or physical.

407 Investigation into an offence means such an investigation by the police or other person charged with the duty of investigating offences or charging offenders; offence includes an alleged or suspected offence, see Criminal Justice and Public Order Act s 51(9).

408 Criminal Justice and Public Order Act s 51(3).

409 Criminal Justice and Public Order Act s 51(6). See also Glazebrook *Blackstone's statutes on Criminal law* 209-211.

Section 21 of the Summary Offences Act 113 of 1981 criminalises conduct that comprises intimidation, obstruction, and hindering –

> 1) Every person commits an offence who, with intent to frighten or intimidate any other person, or knowing that his or her conduct is likely to cause that other person reasonably to be frightened or intimidated, – a) threatens to injure that other person or any member of his or her family, or to damage any of that person's property; or (b) follows that other person; or (c) hides any property owned or used by that other person or deprives that person of, or hinders that person in the use of, that property; or (d) watches or loiters near the house or other place, or the approach to the house or other place, where that other person lives, or works, or carries on business, or happens to be; or (e) stops, confronts, or accosts that other person in any public place.
> (2) Every person commits an offence who forcibly hinders or prevents any person from working at or exercising any lawful trade, business, or occupation.
> (3) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000.

The section provides for specific problems encountered in England. Section 39 of the Criminal Justice and Police Act 2001 also deals with the intimidation of witnesses:

> (1) A person commits an offence if – (a) he does an act which intimidates, and is intended to intimidate, another person ("the victim"); (b) he does the act – (i) knowing or believing that the victim is or may be a witness in any relevant proceedings; and (ii) intending, by his act, to cause the course of justice to be obstructed, perverted or interfered with; and (c) the act is done after the commencement of those proceedings."

It is immaterial if the act is perpetrated in the presence of the victim, or done to the victim, or to another person.[410] A person is liable on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both, and on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both.

The Serious Organised Offence and Police Act 2005[411] regulates the offence of intimidation of persons connected with a research organisation. The category of persons who can be intimidated under this offence includes an employee or officer of an animal research organisation, a student at an educational establishment that is an animal research organisation, a lessor or licensor of any premises occupied by an

410 Criminal Justice and Police Act s 39(2).
411 Serious Organised Offence and Police Act s 146.

animal research organisation, a person with a financial interest in, or who provides financial assistance to, an animal research organisation, or a customer or supplier of an animal research organisation. As evidenced by the variety of offences created in England on different types of intimidation, the crime is perceived as an important and serious offence, especially since the sentences prescribed are stern. Some of the offences do overlap. The wording used in these provisions is more understandable to the man on the street than the wording of the Intimidation Act of South Africa.

6.6.7.2 India

Section 503 of the Indian Penal Code clarifies the offence of criminal intimidation:

> Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.[412]

Punishment for criminal intimidation consists of imprisonment of either description for a term which may extend to two years or with fine, or with both.[413] Section 507 again provides for criminal intimidation by an anonymous communication:

> Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.[414]

The application of the South African Protection from Harassment Act 17 of 2011 overlaps with the elements of these offences. Under this Act, it is possible to apply to a court to obtain information regarding harassing anonymous communications directed towards a person in South Africa.[415]

Still, in contrast to the specific legislation on intimidation in India and England (as discussed above), South Africa does not possess such detailed laws to contend with particular problems such as the intimidation of truck drivers, businesses, witnesses, court personal, or political factions. It may be beneficial for the government to create

412 The Indian Penal Code, 1860 no 45 of 1860 1, Chapter XXII 1452-1454.
413 The Indian Penal Code s 506.
414 The Indian Penal Code s 507.
415 Protection from Harassment Act s 4.

specific offences to cater for these situations. It is important that the wording for these offences to curb intimidation must be user-friendly and instructive since intimidation is regularly an element of protest action.

6.7 Conclusion

South Africa uses a mixture of common law and statutory offences to curb occurrences of public order misbehaviour. These offences were not specifically enacted to curtail unlawful conduct during gatherings, and have a more general application. Accordingly, it can be difficult for an ordinary member of the public to anticipate possible charges that may be raised against him of her stemming from utilising the right under section 17 of the Constitution.

The current supplementary offences of sedition, trespassing, incitement, road traffic offences, and intimidation are not adequate to deal with conduct before or at gatherings or public order misbehaviour. The reasons for protest and how these demonstrations take place are ever changing, therefore, provision must be made for new trends and developments. Legislation prohibiting conduct before and during gatherings must be easily accessible, clear, and understandable to the man on the street. Conduct that is unacceptable must be listed as well as steps that will be taken against participants if they commit offences. It is suggested that the government reconsiders the offences utilised to curb public order misbehaviour, and contemplate enacting offences to prohibit specific conduct that is problematic in the South African context. These offences, the powers of the police in these situations, and international and regional guidelines (as discussed in chapter two) must be grouped together as public order offences to ensure user-friendliness.

In the last chapter of this research, a summary of the thesis will be provided, followed by recommendations and a conclusion.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Summary

In Chapter one, the background of this study is explained. To gather together is a natural human activity shared by people. Usually gatherings are of no interest to the law, they do not need any regulation, and take place without any involvement of the government. South Africa protects the right to assemble peacefully, to demonstrate, to picket, or present petitions in section 17 of the Constitution. However, the Constitution does not only guarantee the right to gather, but also indicates when this right may be limited. The right to gather is essential since gatherings represent the voice of the ordinary man on the street as a means of expressing concerns. Therefore, peaceful gatherings must be benefitted from as far as possible without any regulation.

In this regard, the government has the responsibility to assist and enable its citizens to gather peacefully and unarmed. However, more often than not when people gather – be it peaceful or violent – participants run the risk of being arrested for committing offences. The manner in which the government of the day reacts to gatherings influences the policing, prosecution, and adjudicating of offences that arise from the right to gather. This study focuses on offences that arise from the right to gather and is concerned with the question whether these offences are adequate to encompass current concerns, for example, the use of social media to inculcate protest. The offences that arise from the right to gather are differentiated from other offences since these transgressions are qualified by a wealth of guidelines and case law from regional and international instruments. Therefore, this study comprised a comparative qualitative research methodology where South African offences as regards to unlawful gatherings are compared with the selected foreign legislation and case law of England and India, as well as international and regional guidelines.

Since South Africa is party to a variety of international and regional instruments, Chapter two investigates the application of international and regional law on gatherings in this country. Gatherings, whether peaceful and violent, are a constant

factor in South African life. The Constitution directs that international and foreign law are applicable in South Africa, and that courts – when interpreting the Bill of Rights – must consider international law, and may consider foreign law. Therefore, it is imperative to identify circumstances wherein international or regional instruments have already applied the right to gather when violated by a government. These instruments issue guidelines to aid governments to comply with international legal norms and standards. The guidelines assist with the interpretation of legislation governing the right to gather, and give meaningful context to the application of the right. The *Guidelines on freedom of peaceful assembly* as discussed in paragraph 2.4.3, the *Guidelines on freedom of association and assembly in Africa* as elaborated on in paragraph 2.4.2, and the *General comment* examined in paragraph 2.4.1 are generally all in conformity, and can be seen as universal human rights standards, since the documents are based on case-law and international standards of human rights. These guiding materials are designed to assist governments to adapt existing national legislation to meet this standard. Existing legislation and common law offences utilised to curb disorder in South Africa must, therefore, be measured against these guidelines.

Chapter three considered the duty of the government to enact national legislation to support and give meaning to section 17 of the Constitution. Legislation, for example, the Gatherings Act, must aid the Constitution by regulating the holding of public gatherings and demonstrations, therefore, assisting citizens to arrange protest action. The right is easily limited, for example, by arresting or prosecuting organisers or participants of gatherings. Accordingly, legislation that governs gatherings and the conduct of the executive when facilitating gatherings, must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Although the Constitution protects peaceful gatherings, it depends on the circumstances of each gathering what is deemed peaceful. Proper police training is essential since police conduct at a peaceful gathering may trigger violence. Chapter three focuses on how the Constitution guarantees the right to gather but also permits for limitations in accordance with section 36, as reviewed in paragraph 3.4. National laws and by-laws promulgated by local governments support the right to gather, but may also limit the right to gather to the extent allowed by the Constitution. Certain provisions of the Gatherings Act have already been the subject of constitutional challenges, for example, in the *Mlungwana*-case (see the discussion at paragraph

3.4), the court found that the criminal sanctions in section 12(1)(a) of the Gatherings Act constitute a limitation to the exercise of section 17 of the Constitution, since all the appellants acquired criminal convictions for the failure to give notice of a gathering.

In Chapter four, the Gatherings Act that regulates public gatherings and demonstrations is discussed. This Act confirms that every person has a right to assemble peacefully with other people so as to publicly communicate their opinions on any matter freely. The Gatherings Act must act as an instrument to insure the right to assemble, demonstrate, picket or to petition as guaranteed in section 17 of the Constitution. Accordingly, the Act focuses on safeguarding non-violent gatherings, and to provide for police powers in facilitating gatherings and demonstrations. The Gatherings Act criminalises certain unlawful conduct in relation to the arrangement of gatherings or while the gatherings or demonstrations are in progress. The object of the Act is to balance the right to gather against not unjustifiably infringing on the rights of others.

Procedures are furthermore provided for persons who wish to arrange a gathering. As such, the first point of reference when a member of the public considers organising protest action, is the Act itself. However, the language used in the Gatherings Act is difficult to understand, confusing, and not user-friendly. Although the Act stipulates that notification be given of the protest, the procedure can easily be mistaken for permission required from the local authority, and is, therefore, also misused by local authorities. The provision criminalising the failure to notify the local authority of an intended gathering has been declared unconstitutional. However, the notification procedure is still in place. This decision renders an already inept Act mainly ineffective to provide in its purpose, since quite a few of the other offences are linked to the notice of gatherings. Many of the provisions of the Gatherings Act will possibly not withstand future constitutional muster.

In Chapter five, the common-law offence of public violence is highlighted. This offence is essentially utilised by the state in cases of violent gatherings, dissent, mass-action, protests, or when groups of persons are fighting. An extensive range of acts, depending on the circumstances, fall within the definition, for example, the offence is applicable to the landless poor trespassing; gangs fighting; communities burning property; employees picketing; a private party turning violent; or soccer hooligans

fighting, as long as the conduct acquires serious proportions, and the intent is to disturb the public peace and tranquillity forcefully, or to violate others' rights. One must take into account, however, that international and regional instruments allow for some degree of harassment, isolated acts of violence, conduct that annoy or give offence or temporarily hinders, impedes or obstructs the daily going-about of members of the public, while still deeming the gathering peaceful. Any of the abovementioned conduct will not render a gathering as a whole unpeaceful. The manner in which a police member interprets conduct at a gathering is consequently important to decide if the common-law offence of public violence has been committed or not.

In certain countries such as England and India, specific offences have been created to cater for specific problems experienced with public order. These countries have moved away from the one-offence-fits-all-conduct-approach to enact legislation to cater for specific problems with reasonable sentences. In South Africa, the offence of public violence does not provide for a scale of serious to less serious conduct with correlating, applicable sentences as in these countries. It appears convenient for the state to prosecute any unlawful gathering conduct under the public violence umbrella.

Some of the elements of public violence are open for interpretation, for example, the requirement that conduct must constitute 'serious dimensions'. This prerequisite implies that participants will not be arrested or prosecuted for minor forms of violence. Also, the number of persons needed to commit this offence varies from case to case, and cannot be predicted beforehand, since it is closely linked with the requirement that conduct must reach serious proportions. It is assumed that the ordinary, unrepresented member of society will struggle to establish what conduct is criminalised as public violence, or when conduct will become unlawful. The perspective of the police also needs to be established, as it is the police members on the scene who evaluate conduct as forceful, violent, or in excess, and, therefore, the offence of public violence. It is further challenging to determine when exactly the public peace and order is disturbed, or the rights of others infringed, since most gatherings will annoy or hamper other citizens in their daily activities. The reality is that it is only at the end of a trial, when the presiding officer has heard and considered all the evidence, to conclude whether all the requirements of the definition have been met. The offence of public violence is, therefore, not clearly defined, and can possibly not

legitimately be regarded as a criminal offence.

In Chapter six, the offence of sedition, offences under the Trespassing Act 6 of 1959, incitement under the Riotous Assemblies Act 17 of 1956, offences under the National Road Traffic Regulations 2000, and offences under the Intimidation Act 72 of 1982 are visited. These offences constitute a piece-meal of statutory and common-law offences, and some were never intended to be applicable to gatherings. Participants of gatherings are, therefore, never certain, when arrested, to what charges they will need to answer.

In paragraph 6.2, the common-law offence of sedition is discussed. After 1990, it seems that no prosecution was instituted under this offence in South Africa since the prosecution preferred to proceed with the common-law offence of public violence, terrorist- and related activity offences, or incitement to commit offences. In certain neighbouring countries such as Namibia and Lesotho, which previously formed part of South Africa, prosecution for sedition continued. The offence of sedition was created to be utilised in serious circumstances as a means of suppressing revolutionary calls for political and social reform, or when it is detrimental to the authority of the state. This offence can be abused by the government of the day to silence any criticism – since the provisions do not qualify to which degree the authority of the state must be defiled or assailed, and whether this may include any censure of the state.

The offences under the Trespass Act are discussed in paragraph 6.3. The Trespass Act prohibits unlawful entry or presence upon land and in buildings. This Act covers trespassing in general on occupied and unoccupied land, or buildings or parts of buildings without providing for different conceivable circumstances, or for the motives why persons are trespassing. It accordingly has a one-sentence-fits-all approach. Currently, the Act is utilised as an important tool to combat violent protest action and land invasion of state or private property, and to restore public order. However, there are different Acts in South Africa that govern eviction and occupation, which can be confusing to the general man on the street. Again, in contrast to other countries where specific trespassing offences were created for unique problems with distinct sentences fitting the crime, South Africa mainly relies on the Trespass Act. In England, for example, the legislation provides for the powers of the police in each trespassing situation. Participants are first informed and ordered to disperse, thereby receiving an

opportunity to rectify their conduct. The police powers as prescribed in the Act strengthen the ability of the police to facilitate trespassers, and the provisions also have an educational purpose; informing owners, occupiers and trespassers what to expect from the police in different trespassing scenarios.

In paragraph 6.4, the common-law offence of incitement to public violence as well as the statutory offence of incitement to commit a serious offence under section 18(2)(b) of the Riotous Assemblies Act are discussed. Section 17 of this Act confirms the circumstances in which the common-law offence is deemed to be committed. Section 18 provides for the attempt, conspiracy or inducement of another person to commit an offence. Although the offence of incitement is a useful tool to deter political leaders from inciting their supporters to commit criminal deeds, the Riotous Assemblies Act is clouded in controversy, and seen as originating from apartheid-era laws. As such, the Act is regarded as archaic legislation utilised to persecute erstwhile liberation fighters. The offence of incitement as set out under the Riotous Assemblies Act does not require that it must take place during a gathering. Incitement occurring by means of social media seems to be a growing trend. When political leaders incite their supporters, it is difficult to distinguish between heated political rhetoric, utterances prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, or incitement to commit serious or non-serious offences.

The offences under the National Road Traffic Regulations are discussed in paragraph 6.5. These offences are important when protest action takes place on public roads. In such situations, it is difficult to prove that persons acted together in concert or with a common purpose, especially during violent gatherings. Therefore, it is easier to hold individuals or smaller groups accountable for certain conduct under the National Road Traffic Regulations. Protest action on roads, the shutting down of roads, or causing damage to vehicles attracts the attention of the general public by triggering inconvenience, losses, and damage. It is not always clear what the cause of the protest action is. The opportunity is usually exploited to loot cargo from trucks. The Act assists the state to prosecute individuals seen to commit an offence during protest action.

The Intimidation Act is discussed in paragraph 6.6. In South Africa, intimidation frequently forms part of the conduct at a gathering. Pressure is placed on an individual, the government, groups, or the public, to refrain from doing something or to do

something. To differentiate between threats, intimidation, and political hyperbole may create a problem, as seen in the approach of the court in the *Moyo*-case in 2018, as examined in paragraphs 6.6.2 and 6.6.4. From the minority and majority decisions, it is clear that the wording of the Intimidation Act can be difficult to apply and understand. In the 2019 *Moyo*-case, sections 1(1)(b) and 1(2) of the Intimidation Act were declared unconstitutional and invalid. It is submitted that the remaining offences in the Act will follow suit. The current remaining offences in the Intimidation Act are difficult to read and understand. The average member of the public or unrepresentative accused will find the wording confusing. The field of application of these offences is broad, as the Act attempts to include all possible conduct under the offence. Section 1A of the Act demands that intimidatory conduct must instil fear in, or demoralise or induce those being addressed, yet, these terms are not defined or explained. Although this section may be used to criminalise political hyperbole and emotionally charged rhetoric in the context of political and industrial action, by not defining these important terms the inference is created that any speech or conduct which generates a subjective state of fear in any person, regardless of the intention to create fear, to demoralise or to induce, is criminalised. The Act refers to acts of violence to indicate that the intimidatory conduct must be serious, however, the Act does not require imminent violence or that the act of violence must be able to take place in the near future, or at all. When a provision requires 'reading-in' in order to bring it into conformity with the Constitution, it properly will fail the constitutional test.

7.2 Recommendations

After examining the various offences rising from the right to gather in South African legislation as well as applicable case law on the offences arising from this right, and comparing how the right to gather is considered in international and regional instruments together with relevant legislation in England and India, the following recommendations can be made:

7.2.1 Application of the guidelines in international- and regional instruments

In Chapter two, it is pointed out that although international- and regional case law and guidelines are available, this guiding material is generally not part of the training

courses of police officials, prosecutors and magistrates. Decisions are made daily in courts and police stations without considering any relevant international- and regional case law and guidelines. Available international- and regional guidelines may sway the decision as to whether a participant must be arrested or prosecuted. It will be beneficial for the South African government to incorporate applicable guidelines in legislation, so as to be easily accessible not only to organisers and participants, but also to police members who facilitate gatherings. It is important that participants are informed of the limitations that accompany this right. Guidelines can assist in measuring the conduct of the executive with regard to the facilitation of gatherings, and also create a framework for the conduct of the participant.

7.2.2 Consolidating all public order offences in one Act

In Chapter three, it is recommended that legislation which regulates gatherings must aid the values in the Constitution, therefore, assisting citizens to arrange protest action or to gather. South Africa follows a piece-meal approach in curbing public order misbehaviour. Several statutory and common-law offences are utilised to bring perpetrators to book. Most of these offences utilised by the prosecution were not specifically enacted to prevent unlawful conduct during gatherings, and have a more general application. Hence, members of the public may struggle to grasp the extent of applicable law, and to understand when certain conduct constitutes an offence, especially when utilising their right to gather. It is consequently recommended that all the public order offences must be consolidated into one Act. It is anticipated that the constitutionality of offences under the Gatherings Act, the common law, and other legislation providing for offences that arise from the right to gather, will be subjected to constitutional scrutiny in the near future.

7.2.3 Clear-cut definitions crucial in the Gatherings Act

The definitions contained in the Gatherings Act must be re-examined and linked to the wording of section 17 of the Constitution. The meaning of the word ‘gathering’ must be revisited – a possible solution is to delineate a ‘gathering’ as including the activities of assemblies, demonstrations, pickets and petitioning. The Gatherings Act also distinguishes between demonstrations and gatherings in terms of the size of the group, and where the congregation took place. Gatherings require notification (when more

than fifteen persons intend to gather), while demonstrations can proceed without notification (when less than sixteen persons plan to gather). It becomes problematic when a demonstration is held and people join in solidarity increasing the participants to more than fifteen persons. The Gatherings Act is furthermore silent on what steps an organiser must take in such circumstances in order to rectify the situation. In *Mlungwana*, as discussed in paragraph 4.3, the court considered that the distinction between a gathering and a demonstration is arbitrary and irrational, as it is unclear why sixteen participants is an appropriate number to require notification. The court advised expanding the number of people that may be convened without notice. It is recommended that the difference between what a gathering and demonstration entail must fall away. The Gatherings Act also does not attempt to exclude certain activities from notifications, for example, social or spiritual events. The Act must assist the meeting of persons for a common expressive purpose. As such, certain activities, for example, social, spiritual and cultural must expressly be excluded from any regulation by the government.

7.2.4 Responsibilities to arrange and monitor gatherings to be streamlined

Section 8 of the Act provides for specific duties which need to be adhered to by the organisers, marshals, and participants of gatherings. When organisers and participants do not have access to administrative and financial support, it can be problematic to adhere to these duties. The Act also does not provide for training to be provided to the organiser or marshals to support them in fulfilling their duties, for example, with regard to crowd control.

Additionally, the actual arrangement of the gathering is problematic. It is difficult to anticipate the number of participants and the number of marshals necessary to control the participants. It is basically impossible to hold the organiser and marshals responsible if the gathering does not proceed peacefully. The possibility of being criminally prosecuted, when duties were not properly executed, has a chilling effect on the right to gather. In this regard, there are less restrictive means to keep role players responsible when arranging gatherings as offered in *Mlungwana* (see paragraph 3.4). In this case, the court proposed utilising non-criminal punishments, and relying on other existing criminal provisions that permit police to deal with protests that pose a risk to public order or safety. Restorative justice methods can also successfully be

implemented.

The marshals employed to monitor gatherings are usually not impartial persons but appointed from the heart of the organisation (persons sharing the same beliefs or having the same political aims). This may present a problem, because to proceed peacefully may not be beneficial for the organisation in order to disseminate their viewpoints. There is furthermore no requirement in the Act that the marshals appointed must be present from the start until the end of the gathering. Additionally, there is no available instruction in the Act as regards a suitable age or age limit for marshals, therefore, grade 8 schoolchildren may be utilised as marshals.

Although the Gatherings Act does not provide that the organiser is responsible for the costs to arrange for safety and security during a gathering, the Regulations relating to Emergency Care at Mass Gathering Events, as discussed in paragraph 3.5.1, are increasing the complexity for an organiser to arrange events involving marches or demonstrations. Without assistance and funds to pay for expensive medical services, it seems impossible to arrange an event involving more than 1000 participants. The Regulations, therefore, also seriously restrict the right to gather, and should be re-considered.

7.2.5 Amendments to the notice procedure in the Gatherings Act required

Although the failure to notify the authorities of an intended gathering does no longer constitute an offence, the notice procedure as provided for by the Act is still applicable. Organisers still need to notify the local authority of a planned gathering, however, there is no consequence if they make no report. The notice procedure was regrettably not considered by the Constitutional Court. It is anticipated that the notification procedure will become problematic in the future, and that notification will only proceed in circumstances of planned mass action, or where the assistance of the police is necessary. In practice, many of the provisions of the Gatherings Act have been rendered ineffective since section 12(1)(a) of the Gatherings Act was declared unconstitutional. Organisers are aware that if no notice was given, there is no risk that they will be prosecuted for some of the other offences under the Gatherings Act, for example, not attending a meeting called by the responsible officer (local authority).

It can be a time-consuming and confusing exercise for a member of the public to identify the person who needs to be notified of a planned gathering at the local authority. It is suggested that the requirement of a notification to the local authorities must fall away. It is recommended that the organiser or a member of the general public notify a designated police member (who is part of a central body) in person at the nearest police station, or by forwarding a simple e-mail or text message at least 48 hours before the event. The purpose of the notification must be to inform of the coming-together to receive assistance.

E-mail or text message communication between the organisers, participants, and police could be vital tools in facilitating peaceful gatherings. Instant messaging is a fast and cheap way of dispensing information with regard to possible foreseeable problems as to routes, the names of marshals and identification. It is beneficial to communicate online due to the quantity of information that can be distributed. Information such as the cause, background, place, time, reason or guiding material with regard to what conduct is deemed unlawful or steps that will be taken by the police, can be distributed. The ease of notifying and assistance from the police will hopefully induce the general public and organisations to more readily inform the police of the intention to hold a gathering. In turn, the police will not be caught unawares, and will be better equipped to facilitate the gatherings and prevent injuries and damage.

Lastly, the information required by the Gatherings Act in the notice is excessive. It will be difficult for a member of the public, specifically the poor, to obtain all the information required in the notice without assistance. In *Mlungwana* (see paragraph 4.4.2), the court found that the notice requires considerable effort on the part of the organiser, first to be familiar with the provisions of the Act, and then to satisfy the requirements. It is consequently proposed that the information required be simplified, and be made available digitally in the form of tick boxes. It is recommended that a central body must manage this information, attend the gatherings, open a consultation process during the gathering and investigate offences committed.

7.2.6 Clarity required as regards consultation and negotiation in the Act

According to the Gatherings Act, if the responsible officer is of the opinion that discussions are necessary, a meeting must be called with the relevant persons or

bodies to discuss the contents of the notice, amendments thereof, additions thereto, and any conditions to be met. The responsible officer must ensure that the discussions take place in good faith. Regrettably, the responsible officer's perception of what 'good faith' entails may play a critical role in this process. Once the meeting takes place, the responsible officer is given a significant degree of discretion in deciding whether or not to prohibit the gathering. The conditions imposed by the responsible officer can render the reason for the gathering ineffective. Such excessive obligations may be imposed on intended gatherings organised against poor service delivery of dysfunctional municipalities. It was not foreseen, when the Act was enacted, that the level of service delivery of local authorities may be the main reason for gatherings, and that the notification process may aid local authorities in obstructing these intended assemblies.

The purpose of the consultation and negotiation processes under the Gatherings Act is unclear when the organiser or the authorised member is not present at the meeting called by the responsible officer, and the responsible officer continues and imposes conditions. Effectively, it means that the local authority (consisting of the responsible officer – a single person) will decide how and where the gathering will proceed without the relevant parties being at the table. It seems that the responsible officer appointed by the local authority has the final say regarding the appointment of an organiser and the authorised member (member of the police), amendments and conditions, or to prohibit the gathering. As such, the subjective beliefs, political affiliation or views of one person employed by the local authority may play a part in a vital decision-making process. It is strange that an official of a municipality can restrict the police in performing their duties by withholding approval to appoint the authorised member. When the responsible person withholds his or her approval to appoint another organiser, the organisation will be unable to arrange the planned gathering, or will need to approach the court for assistance. It is, therefore, recommended that notification to local authorities fall away.

It is recommended that in circumstances where the protection of public order, public safety, and the rights and freedoms of others are in danger, and no agreement could be reached between role-players; the police, on instruction of the central body, must apply for an order from a local magistrate to prohibit the gathering for a specific period or to implement specific conditions. The magistrate must be able to hold an urgent

inquiry, attended by all relevant role-players.

7.2.7 Revision of the notification period in the Gatherings Act

In South Africa, the organiser must give notice at least seven days before the gathering is to be held. When it is not reasonably possible to give earlier notice – then notice needs to be furnished at the earliest opportunity. However, when notice is given less than 48 hours before the commencement of the gathering, the responsible officer may prohibit the gathering. It seems that the responsible officer has the discretion to decide whether a notice is 'reasonably possible', and if it was provided at the 'earliest opportunity'. The decision to go ahead to proceed with the gathering, or to impose conditions, may rely on the decision or whims of one person only, the responsible officer. This proviso puts this section at odds with most international instruments. The seven-day notice period grants or allows the government leverage to decide if and how to act against the notification. The Gatherings Act does not expressively provide for online notification or online facilitation of gatherings, which will progressively improve the notification and facilitation procedures. A simple online notification, 24 hours before the event, to the nearest police station where the gathering will take place, can be adequate to alert the authorities.

7.2.8 Training and education to be provided to all role players involved with gatherings

The Gatherings Act must be more instructive, and include clear-cut guidelines with regard to what public order conduct is unacceptable and will result in criminal proceedings. The Act further needs to stipulate the powers of the police and the set out the distinct steps the police need to take when gatherings become violent. The gathering's organiser and participants as well as members of the public must be informed beforehand what is to be expected from the police in certain situations.

The police must be trained to facilitate gatherings, and to act proactively in allowing gatherings to take place. Although a specialised public order police unit is trained to manage and control crowds in order to restore public order, it is usually the local police members who are first on the scene, and who assist in facilitating gatherings. These police members, in general, did not receive any formal crowd management training,

was not part of the negotiation process, and are not in possession of the necessary equipment (specifically video apparatus and cameras) to aid with evidence in courts. Obtaining evidence to proceed with prosecution is further challenging when the police have no knowledge of the duties and requirements of section 8 of the Act. The police struggle to distinguish between onlookers who mingle with the crowd and participants committed to the gathering. It is furthermore difficult for the prosecution to prove that suspected participants were not intimidated to participate against their will – a popular defence in protest action cases. Police will also require guidance on the application of section 9(2)(d) of the Gatherings Act that permit the use of firearms or other weapons in circumstances where there is an intention to damage property. Woolman is of the opinion that this section is unconstitutional, as discussed in paragraph 4.4.7.

The public as potential and participant gatherers must be informed and educated with regard to their right to gather and what conduct is deemed unacceptable. The police may allow a gathering to proceed on conditions they deem fit where no notice was given. It may confuse citizens when they were previously allowed to continue with a gathering, only to be dispersed or arrested on the following day for offences committed. Participants of violent gatherings are also sometimes arrested to minimise the danger to persons and property, without a clear indication how they contributed to the offence. If these persons were properly informed of the procedural aspects of the Gatherings Act, many such issues will be eliminated.

7.2.9 More facilitation and promotion of the Gatherings Act

The Act must not be seen by the general public as hampering the right to gather but rather facilitating it. More must be done by the government to promote the Act as user-friendly. The mind shift must also be made by communities that they can trust the police to facilitate peaceful protest. It may be beneficial to consider administrative fines and restorative justice outcomes, especially since protesting is sometimes the only means by which the poor may accentuate their plight. Persons must be allowed to gather although it may be annoying, and create discomfort to other members of the public. When offences are committed, for example, the destruction of property, criminal prosecution must follow. Social media is playing a major role in the arrangement of protest action; therefore, the Act must provide for online facilitation. The police member and a central body consisting of all relevant role players need to

put in place the necessary arrangements to facilitate the gathering, and must utilise any popular means to inform participants and the public of arrangements.

It is evident from the above that the government must reconsider the provisions of the Gatherings Act, since it no longer seems functional or relevant to the current context. To protest is inherent to the people of South Africa, and the Act regulating the gathering of persons must be supportive, easily readable and understandable.

7.2.10 Codifying public order offences

In Chapter five, it is observed that public violence is primarily the only offence to prosecute the violent conduct of a group of people in South Africa. However, the offence of public violence is not clearly defined, which yields numerous challenges. First of all, it is perplexing to establish when exactly the public peace and order will be disturbed or the rights of others infringed, since most gatherings will annoy, give offence, frustrate, or hinder other citizens in their daily activities. International and regional instruments on gatherings allow for some degree of harassment; isolated acts of violence; or conduct that irritates, causes offence, or temporarily hampers or obstructs the daily undertakings of members of the public. The police must consequently be careful not to arrest all the participants of a gathering if only one person displays forceful conduct.

The definition of public violence is very extensive which could lead to the ordinary citizen struggling to establish what conduct is prohibited, or when conduct became unlawful. The reality is that only at the end of a trial, when the presiding officer has heard and considered all the evidence, will it be clear if all the requirements of the definition were met. It is furthermore difficult to determine beforehand when the offence of public violence will be committed as the opinions of the police member, members of the public, the organiser or participants on the scene may differ with regard to the degree of conduct that is necessary to constitute ‘serious dimensions’ as required in the Act. The number of persons required to commit this offence also varies from case to case, and cannot be predicted in advance; it is moreover closely linked with the requirement that conduct must reach ‘serious dimensions’. To establish the exact number of people deemed sufficient to commit the offence is problematic. This uncertainty can be clarified by amending the current definition to include ‘anybody who

commits an act, alone or with other persons'. The meaning of what specifically qualifies as 'intended forcibly' in the definition is unclear – this raises further questions with regard to passive resistance, and when the force or violence will be sufficient to constitute the offence.

It is evident from the above that there are many obstacles in establishing the seriousness of each volatile gathering. This is a precarious situation since, depending on the seriousness of the conduct, i.e. factors including time, locality, duration, damage, injuries or violence, the case can be heard in the district, regional or high court which implies different sentences. The discretion with regard to the forum is that of the prosecution. It raises the question if the decision of the prosecutor was correctly carried out since it influences the possible punishment of the accused when he or she is convicted of public violence.

To eliminate the above-mentioned problems caused by the broad definition of public violence, it is recommended that specific conduct must be criminalised in order to assist the police in removing persons displaying unwanted, threatening, or disorderly behaviour from gatherings before it escalates into more serious conduct. Since the right to gather is extensively utilised by the public, it may be fruitful to incorporate police powers into public order offences; thereby informing everyone what to expect from the police in certain circumstances. The steps the police need to take when gatherings became violent must be clear. An offence must be enacted for situations where participants fail to comply with an order issued, or did not adhere to the call to disperse when a gathering is violent. Although such an offence is available in the Gatherings Act, it is not clear if it is applicable in public violence scenarios.

Specific consideration must be given to create offences for looting in public-violence circumstances or where organised crime syndicates are involved. It is a worrying trend that people or organised groups commit offences under the pretence that they are participating in gatherings, while their only intent is to loot shops, burglarize houses, or to rob community members. The right to gather is furthermore abused by exploiters who rent unemployed persons to protest on their behalf. It may be worthwhile to create an offence criminalising the hiring of persons to commit acts of public violence, or to be hired to commit such acts, or to harbour the hired persons.

It may also be fruitful to hold a member of the police accountable, when he or she received information of public violence, and without reasonable excuse fails to take all reasonable steps to facilitate or suppress it as soon as possible. This offence places a duty on the security forces to stay alert, and to diffuse disorderly gatherings. Such an offence may assist to prevent more participants from gathering, thwart violence from escalating, aid in controlling riotous behaviour, and prevent damage to property, infrastructure and injuries to the public. violent gatherings.

Consideration must further be given that aggrieved parties, including the police, communities and municipalities, may apply to the nearest district court for a banning order, preventing instigators from attending meetings or visiting places where public violence can originate, but then again the banning order may only apply for a specific period of time. The police must also be permitted to stop persons on their way or travelling to attend violent gatherings.

It is subsequently proposed that South Africa departs from the current one-offence-fits-all-conduct-approach, and enact legislation to cater for specific problems. The codified public order offences must distinguish between different types of conduct, the prevalence thereof, and take in consideration more and less serious conduct with applicable, correlating sentences. Such codified offences must also be more accessible, legible and understandable to the man on the street.

7.2.11 Abolishing the offence of sedition

In paragraph 6.2, it is stated that the offence of sedition is extensive and open to different interpretations, and will, accordingly, possibly not withstand constitutional muster. After decades of disuse, it is still unclear what the elements of sedition specifically constitute, since it depends on the circumstances of each case. A member of the public without the assistance of a legal representation will find it challenging to establish how many people are required to constitute a concourse or gathering, and when it will become unlawful. It is furthermore uncertain if the gathering needs to include violence, threats of violence, or forcible conduct. Only at the end of the trial, after hearing all the evidence, will the decision of the presiding officer indicate if the offence of sedition was committed or not. It is recommended that the common-law offence of sedition must be abolished.

7.2.12 Trespassing to resort under public order crimes

As the Trespass Act (as discussed in paragraph 6.3) is an important tool in assisting the police in South-Africa in removing unlawful occupiers of buildings or land, it is suggested that trespassing offences must resort under crimes relating to public order. It is also recommended that legislation with regard to trespassing must provide for the duties of the owner or occupier of land or buildings, which include taking reasonable steps to, firstly, request trespassers to leave, and, secondly, to notify the police as soon as possible. The police must be able to facilitate trespassers without waiting for a formal complaint when it is reasonably suspected that people do not have permission to be on land or in buildings.

There are distinctive problems as regards trespassing in South Africa, and these challenges must be specifically addressed in the Act. For example, persons instigating others to invade land or who fraudulently sell land belonging to municipalities and exploit the poor to trespass, must be met with harsh sentences. Also, illegal mining not only constitutes a substantial economic problem in South Africa, but illegal miners are trespassing for the purpose of mining, damaging, dismantling and selling infrastructure. Trespassing by illegal miners constitute unique circumstances since miners trespass underground for prolonged times, and they need assistance in the form of food and other necessities to survive. Regular mine personnel are assisting illegal miners with access to the mines by smuggling desired supplies for financial gain. Legislation providing that assistance to illegal miners on mine property is read into a definition for trespassing will be beneficial.

The Act must furthermore provide for situations where illegal occupiers move back onto land and into buildings after being evicted by a court order. Owners are left without any remedy when community members prevent the offender from being evicted – breaking open and carrying furniture back into buildings. Such assistance must be included into the definition of what trespassing entails. Not allowing trespassers for a specified time period to return to the land may be of assistance here.

When trespassers start to occupy land, a slow and costly court process is required for eviction. It is, therefore, important that the police are able and well-informed to act appropriately in all circumstances. It seems that the police on a local level do not

possess the knowledge to facilitate trespassers. The police are regularly criticised for their unsatisfactory facilitation of trespassers since they do not comply with their constitutional obligations. It is recommended that this situation be rectified by proper training and education as regards the prescriptions for trespassing.

The powers of the police in trespassing situations must clearly be set out in the Act. This will strengthen the police's ability to facilitate trespassers. Decisions must be taken by senior police officials after receiving proper training. Incorporated police powers will have an educational purpose, informing owners, occupiers and trespassers what to expect from the police in different situations. Trespassers must be informed of the consequences of their conduct, and then receive an opportunity to rectify their conduct. If they do not adhere to the instructions, arrested may follow. The process must be well-documented and photographed. The police must take proper note of the identity of trespassers and places of trespassing. The police must be able to stop potential trespassers on their way to join trespassers. Lastly, the adoption of offences for different trespassing scenarios will assist to finalise cases more speedily in courts. Restorative justice outcomes can also play a positive role in this process.

7.2.13 Riotous Assemblies Act offences to be included in a Criminal Law Amendment Act

As the Riotous Assemblies Act (considered in paragraph 6.4) causes much disgruntlement due to being created by the apartheid government, it is recommended that legislation providing for attempt, conspiracy and incitement be included in a Criminal Law Amendment Act.

7.2.14 More specific offences to replace Intimidation Act offences

In paragraph 6.5 of the study, the offences under the Intimidation Act are discussed. In South Africa, intimidation is frequently part of the conduct at a gathering. To differentiate between threats, intimidation and political hyperbole creates a serious problem, as seen in the two *Moyo*-cases, where sections 1(1)(b) and 1(2) of the Act was declared unconstitutional and invalid. It is anticipated that the remaining offences in the Act will follow suit, especially since the remaining offences in the Intimidation Act are difficult to read and understand. The average member of the public or

unrepresentative accused will struggle to make sense of these offences. The field of application of these offences is also overly broad, attempting to include all possible conduct. Certain wording in the Act, such as section 1A of the Act, are unclear and vague. The phrases ‘to put in fear or to demoralise or to induce’ and to ‘perform any act which is aimed to cause, bring about, promote or contribute toward such act’, are ambiguous. The section can prohibit political hyperbole and emotionally charged rhetoric in the context of political and industrial action. By not defining the meaning of ‘fear, to demoralise or to induce’ implies that any speech or conduct which created a subjective state of fear in any person, regardless of the intention to create fear, to demoralise or to induce, is criminalised. The Act attempted to rectify this oversight by referring to acts of violence, however, the Act does not require imminent violence or that the act of violence must be able to take place in the near future, or at all. When a provision needs reading-in in order to bring it into conformity with the Constitution, it undoubtedly will fail the constitutional test.

As stated in paragraph 6.6.4 above, the presumption in section 1A(2) of the Act raises more problems than answers since the prosecution does not need to prove that the act of violence or threat of violence is imminent or will take place in the near future, or will take place at all. In terms of section 1A(4) of the Act, any threatening utterance of harm can be sufficient to commit the offence. The act or threat must only likely result in putting in fear or demoralising or inducing the general public. Actual fear, demoralisation or inducement is not a requirement. These presumptions are too broad and imprecise to withstand constitutional muster.

In South Africa, problems are encountered with specific situations, for example, the intimidation of truck drivers, businesses, witnesses, court personal or political factions. It may be beneficial for the government to create offences to cater for these circumstances. It is suggested that the government revisit the Intimidation Act and consider enacting offences to prohibit specific conduct. It is important that the wording of such offences must be user-friendly and instructive since intimidation is a consistent element of protest action and lies at the heart of the right to gather.

7.3 Conclusion

This study on the various offences rising from the right to gather in South Africa strived to answer pertinent research questions raised under Chapter one. A comparative evaluation was employed intending to provide additional and different perspectives on the right to gather in order to appropriately appreciate its interpretation and application in South African criminal law. In conclusion, it can be stated that the research questions of this thesis have been answered, and the hypotheses proved:

- The current common law and statutory offences utilised to curb technical offences in the arrangement stage of intended gatherings, or during gatherings or violent conduct at gatherings are not adequate to provide for the unique problems of South Africa.

- The government must assist and enable its citizens to gather peacefully and unarmed. Clear and well-drafted legislation on acceptable public order conduct will support the government to protect this right for everyone to enjoy. The Gatherings Act is the public's first reference when they intend to arrange a gathering. Many members of the public cannot afford legal advisers – therefore, it is essential that the Act must be accessible, understandable and user-friendly.

- Public order offences are generally utilised by the prosecution in cases relating to dissent, mass action, or protest. These offences consist of piece-meal statutory- and common-law offences. Some of these offences were never intended to be applicable to gatherings. When arrested, participants of gatherings are, therefore, never certain to what charges they will need to answer.

- The existing legislation and common-law offences are not always suitable to provide for new developments, for example, the use of social media to mobilise protest.

- It is uncertain if many of the current offences will withstand constitutional challenges.

- South Africa must move away from the one-offence-fits-all-conduct-approach in cases of public violence and enact legislation to cater for specific problems with

different degrees of seriousness with reasonable sentences fitting each offence.

- The common-law offence of sedition must be abolished.

- The Trespass Act is an important tool for the government to combat land invasion of public or private property, or persons trespassing with the intention to commit offences. The Act must clearly map out police powers and the consequences of unlawful conduct in such scenarios. Offences must be created for different situations with applicable sentences. Sentence options must also provide for restorative justice outcomes.

- Offences with regard to intimidatory conduct must provide for specific problems experienced in South Africa.

- The government must revisit the amalgam of current offences utilised by the prosecution during dissent, public violence, or protest action, and create a single public order Act regulating specific unlawful conduct with corroborating sentences. New and creative legislation is needed to regulate the coming together of persons in a public space, including online spaces, for a common expressive purpose.

- Police powers must be clearly defined to strengthen the hand of the police to secure law and order, serve as guarantee for the rights and freedoms of everyone and to create legal certainty.

- Existing guidelines from applicable international and regional instruments which guide and monitor executive conduct must be included in legislature since these guidelines qualify public order offences. Guidelines have an educational purpose, informing participants what to expect from the government, what conduct is deemed unacceptable and the consequences of not adhering to it.

- It is important that the police, prosecutors and judiciary are well versed in the application of guidelines with regard to the right to gather since they are designed to assist governments to meet human rights principles.

- New and created legislation alone will not be sufficient to prevent violent conduct during gatherings. The government needs to be seen to listen and act on the

concerns of society.

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